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WILLIAM R. JOHNSON,
Defendant in Error,

v.

JOHN FREHR et al.,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

272 I.A. 601

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This writ of error seeks to reverse the decree of sale in a foreclosure proceeding in which William R. Johnson was complainant and John Frehr and Anna Frehr, his wife, were defendants, and to set aside the subsequent orders entered by the Superior court (1) approving the master's report of sale and distribution and entering a deficiency judgment; (2) appointing a receiver; (3) requiring defendants to pay to receiver rents collected prior to the appointment of the receiver and while defendants, the owners of the equity, were actually and solely in possession of the premises.

November 30, 1931, a bill in chancery was filed by William R. Johnson to foreclose the lien of a trust deed executed by John Frehr and Anna Frehr, to secure part of the purchase price for the premises described therein, amounting to $60,000.

The bill of complaint alleges that the trust deed was executed November 23, 1926; that defendants are justly indebted to the legal holder of the principal promissory note for $60,000, of even date with trust deed, and due five years after date. The bill also alleges that interest note No. 10 for $1800, which became due November 23, 1931, had not been paid and that complainant is the owner of the principal note together with interest

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November 30, 1931, a bill in chancery was filed by William R. Johnson to foreclose the lien of a trust deed executed by John Frerr and Anna Frerr, to secure part of the purchase price for the premises described therein, amounting to $80,000.

The bill of complaint alleges that the trust deed was executed November 23, 1926; that defendants are justly indebted to the legal holder of the principal promissory note for $80,000, of even date with trust deed, and due five years after date. The bill also alleges that interest note No. 10 for $1800, which became due November 23, 1931, had not been paid and that complainant is the owner of the principal note together with interest

note No. 10; that the premises are improved with a twelve flat apartment building, the present fair cash market value of which does not exceed $50,000, which is inadequate security for the payment of the indebtedness secured; that it will be necessary for complainant to resort to the rents, issues and profits in order to be paid the amount due.

The bill prays for the appointment of a receiver and a deficiency judgment in the event that the proceeds from the sale of the property are not sufficient to satisfy the decree.

Copies of the principal note and interest note No. 10, both due and unpaid November 23, 1931, were attached to the bill of complaint, together with a copy of the trust deed.

December 23, 1931, the court entered an order denying complainant's motion for the appointment of a receiver. An answer was made in behalf of defendants January 23, 1932, admitting the execution of the notes and trust deed, but asserting that the value of the property was in excess of $75,000. The cause was referred to the master in chancery January 30, 1932, and on the same day a petition was filed by complainant containing the material allegations of the bill of complaint and also alleging that defendants were insolvent; that they were without means to satisfy a deficiency decree and that the gross rental from the premises was approximately $800 a month, and praying that an order be entered directing defendants to preserve and keep intact all rents, issues and profits, subject to the order of the court.

An answer was filed to this petition and there is some controversy as to the date upon which this motion was to be heard by the court. However, March 1, 1932, the court ordered defendants to preserve and keep intact the rents for the months of March and April, 1932, until the further order of the court.

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An answer was filed to this petition and there is none contrary as to the date upon which this motion was to be heard by the court. However, March 1, 1932, the court ordered defendants to preserve and keep intact the rents for the months of March and April, 1932, until the further order of the court.

The master filed his report March 1, 1932, wherein he found all of the material allegations of the bill of complaint to be true; that defendants were indebted to complainant in the sum of $66,428.27, enumerating various items authorized to be charged as additional indebtedness under the terms of the trust deed.

March 4, 1932, the decree of sale which overruled all exceptions to the master's report was entered in conformity with the findings of the master. Par. 2 of the findings of the decree contained the correct legal description of the same property described in par. 3 of the bill of complaint, which property is the subject matter of this litigation.

It appears that through the inadvertence of a stenographer the decree of sale presented, and which was signed by the court, contained on its last page a misdescription of the premises in question; that on the same date an employee of the Chicago Title & Trust Company discovered the error and reported it to the minute clerk in Judge Gentzel's court, who immediately drew the court's attention to the matter; that the court directed that the attorney for complainant be notified and that such attorney on the same day went to Judge Gentzel's court room, and having been advised by the court removed the last page of the decree and replaced it with a typewritten page containing the identical wording of the page that had been removed, except that the correct description of the premises was substituted for the misdescription on the original last page; that the following morning the attorney presented the decree containing the corrected page to the master, who examined and approved the same, and then presented it to the chancellor, who signed it without notice to defendants.

Defendants filed a petition March 28, 1932, to set the corrected decree aside and to restore the original erroneous page

The master filed his report March 1, 1932, wherein he found with all the material allegations of the bill of complaint to the effect that defendants were indebted to complainant in the sum of $91,108.77, representing various items authorized to be charged as additional indebtedness under the terms of the trust deeds.

March 4, 1932, the decree of sale which overruled all exceptions to the master's report was entered in conformity with the findings of the master. Par. 3 of the findings of the decree contained the correct legal description of the same property described in par. 3 of the bill of complaint, which property is the subject matter of this litigation.

It appears that through the inadvertence of a stenographer the decree of sale prepared, and which was signed by the court, contained on its last page a misdescription of the premises in question; that on the same date an employe of the Chicago Title & Trust Company discovered the error and reported it to the minute clerk in Judge Lindsay's court, who immediately drew the court's attention to the matter; that the court directed that the attorney for complainant be notified and that such attorney on the same day came to Judge Lindsay's court room, and having been advised by the court removed the last page of the decree and replaced it with a typewritten page containing the identical wording of the page that had been removed, except that the correct description of the premises was substituted for the misdescription on the original last page; that the following morning the attorney presented the decree containing the corrected page to the master, who examined and approved the same, and then presented it to the chancellor, who signed it without notice to defendants.

Defendants filed a petition March 24, 1932, to set the original decree aside and to replace the original erroneous page

of the decree that had been removed and replaced on the ground that the court erred in entering the corrected decree without notice to defendants, and urged in the petition that the master's sale set for March 30, 1932, be stayed. This petition was heard on the day of its filing and defendants' motion was denied by the court.

The master's report of sale and distribution was filed April 29, 1932, stating that the premises were sold April 16, 1932, to complainant for $37,000, and that there was a deficiency of $10,463.10. An order was entered by the court on the same day approving the sale and for a deficiency judgment against defendants for the above amount. The order also found that complainant was entitled to the appointment of a receiver to collect the rents and profits which were to be applied toward the reduction of the deficiency.

June 26, 1932, a petition was filed by complainant for the sequestration of the March and April rent theretofore ordered by the court to be preserved by defendants pending the further order of the court.

July 26, 1932, an order was entered on defendants to file within sixty days a report and account of rents collected by them for March and April, 1932, as well as disbursements made by them out of said rents, and to pay over to the receiver the balance remaining in their hands.

Defendants contend that there was a variance between the allegations of the bill of complaint and the evidence, which rendered the decree of sale void, and in consequence that the sale and deficiency judgment were also void.

It is urged that the bill did not specifically allege that there was a default in the payment of the principal note

of the lumber that had been removed and replaced on the ground that the court erred in sustaining the motion of defendants plaintiff in defendants, and again in the granting that the mandate made and for March 20, 1924, be stayed. This petition was denied on the day of its filing and a judgment entered was entered by the court.

The manager's report of sale and distribution was filed April 20, 1922, showing that the proceeds were only April 12, 1921, to creditors for $27,000, and that there was a deficiency of $13,163.10. A motion was entered by the court on the same day overruling the sale and for a deficiency judgment against defendants for the above amount. The court also found that complainant was entitled to the appointment of a receiver to collect the rents and profits which were to be applied toward the indebtedness of the defendants.

On May 24, 1922, a petition was filed by defendants for the appointment of the Sarah Wallingford Trust Corporation authorized by the court to be appointed by defendants pending the further order of the court.

July 20, 1922, an order was entered on stipulation to file within sixty days a report and account of their activities by them for March and April, 1922, in this appointment sale by them out of said rents, and to pay over to the receiver the balance remaining in their hands.

Defendants contend that there was a variance between the allegations of the bill of complaint and the evidence, which showed the course of sale very, and in consequence that the sale was unlawfully delayed over nine years.

It is argued that the bill did not specifically allege that there was a delay in the payment of the principal note

and that relief cannot be granted because the proofs are not sustained by the allegations of the bill. There were allegations to the effect that the principal note was due and payable November 23, 1931; that the value of the premises was not to exceed $30,000, which was inadequate security for the indebtedness secured by the lien of the trust deed, and that it would be necessary to resort to the rents, issues and profits of the premises in order that complainant might be repaid the amount due on the principal and interest notes. We do not think that there was such a variance as is insisted upon by defendants and although the allegations of the bill of complaint are not as aptly phrased as they might be, they were sufficiently clear and understandable as to advise defendants as to the defaults on both the principal and interest notes with which they were charged and against which they must defend themselves. In Illinois Terminal R. R. Co. v. Thompson, 210 Ill. 226, 232-3, considering a similar contention, where variance between the allegations and the proof were charged, the court held:

"In this connection it is charged by the appellant, that there was a variance between the allegation in the declaration and the proof upon this subject. * * * It is a sufficient answer to this contention that counsel for the appellant did not specifically call the attention of the trial court to the variance in question, when the evidence was introduced. A party in order to avail himself of a variance between the proof and the declaration in a court of review, must show from the record that the alleged variance was specifically called to the attention of the trial court, so that thereby the opposite party could have an opportunity to amend his pleading. (Wight Fire-Proofing Co. v. Toczekai, 130 Ill. 139; Chicago, Rock Island and Pacific Railway Co. v. Clough, 134 id. 586; Chicago and Grand Trunk Railway Co. v. Spurney, 197 id. 471; Traders' Mutual Life Ins. Co. v. Johnson, 200 id. 559; Illinois Life Ass. v. Wells, 200 id. 445; Chicago and Eastern Illinois Railroad Co. v. Miller, 195 id. 9; Lake Shore and Michigan Southern Railway Co. v. Ward, 135 id. 511.)"

Complainant testified before the master that he was the legal holder of the principal note and interest note No. 10; that both notes were due and payable November 23, 1931, and that nothing had been paid on either of them. After proof of execution, the

principal note for $60,000, the interest note for $1800, and the trust deed were received in evidence.

Complainant was not cross-examined, no objection was made to the introduction of the principal note, and neither the master nor complainant was advised by specific objection of defendants' counsel of any claimed variance between the allegations of the bill and the proofs. Defendants offered no evidence before the master and it was only after proofs had been closed and the master had advised the parties that he was ready to present his report to the court that defendants raised the question of variance in their objections to the approval of the master's report. The objections were overruled by the master and when the same point was raised in exceptions to the approval of the report by the court the exceptions were overruled by the chancellor. If there was any pertinency or force to this objection to be effective it should have been made at the time the evidence was offered or introduced, and not having been made in apt time, in our opinion, this contention is without merit.

Defendants next contend that the chancellor erred in removing the last page of the decree of sale, which had been signed by him while counsel for all parties were in attendance upon the court, because of the misdescription of the premises in question; in substituting therefor another page that was identical with the one removed, except that it contained the correct legal description of the premises foreclosed; and in signing and entering the corrected decree without the consent of or notice to defendants. Defendants' motion to restore the page which had been removed was overruled by the court and the order contained the following finding:

"The court further finds that no notice of the proceedings to correct the description in the original decree was given to the solicitors for the defendants by either the court or counsel for the complainant, but further finds that the defendants herein were not

pleadings were for the defendants, the interests were for the party, and the first need were involved in validity.

Complainants was not accommodated, in objection was that in the interpretation of the pleaded note, one neither the maker nor complainants was defined by specific objection of defendants' counsel of no claimed wrongness between the allegations of the bill and the proofs. Interpreters differed on evidence before the master and it was only after proofs had been taken and the master had defined the parties that he was ready to render his report to the court which concluded solely the question of wrongness in their interpretation to the material of the minister's report. The objections were overruled by the master and also the same point was raised in exceptions to the findings of the report by the court. The complaints were overruled by the chancellor. In brief the only particularity or force to this objection to be effective is should have been made at the time the evidence was offered or introduced, and not leaving it not time, in the opinion, this conclusion is without merit.

Defendants next contend that the decree filed in the matter the last page of the decree of July, which had been signed by the white counsel for all parties was in accordance upon the court, however at the substantiation of the pleaded in validity in substituting therein another page that was inserted with the decree, except that it included the relevant legal descriptions of the property involved and in signing and entering the decree without the consent of or notice to defendants. Defendants' motion to restore the page which had been removed was overruled by the court and the order contained the following recitals:

"The court further finds that on motion of the prevailing party the decree was signed in the original course was given to the substituted for the complainant, but further finds that the defendants herein were not notified by either the court or counsel for the

corrected

prejudiced in any way thereby; that the premises described in the decree now of record in this court were the premises which the complainant and the defendants had knowledge of and were the premises intended to be foreclosed; that the correction of said original decree was made in term time and the rights of the several parties have not been affected by the correction complained of."

We are of the opinion that the finding and order of court were equitable and proper and that there is no merit in this contention of defendants, inasmuch as this was not a controverted question and the failure of the court to observe the rules of the Circuit court as to notice in this instance was at most a harmless error, the rights of the parties were not affected by the correction and the chancellor, in ordering the correction, did nothing more than make the decree speak the truth.

Defendants further contend that the court erred in entering the orders directing them to preserve, keep intact and pay over to the receiver subsequently appointed rents collected by them for the months of March and April, 1932, while they were in actual possession of the premises and prior to the appointment of a receiver. Complainant advances no argument and cites no decisions of this or any other jurisdiction to justify the entry of this order. The merit of this contention is attested by numerous decisions of our Supreme court and it has been consistently held that the mortgagor is entitled to rents and profits of the mortgaged premises until either the mortgagee takes possession or the court actually appoints a receiver. In considering this proposition the Supreme court in Rohrer v. Deatherage, 336 Ill. 450, 454, states:

"The first proposition of the plaintiff in error that the inclusion in the Rohrer mortgage of the rents, issues and profits of the land, with the land itself, would not alone deprive the mortgagor of the right to receive the rents for his own use until the mortgagee took some steps to enforce his lien upon the rents and profits, is a correct statement of the law and is supported by the authorities cited. The mortgagor is entitled to his rents

until a receiver is actually appointed and the receiver cannot collect rents already paid to the mortgagor. (Italics ours.) (Mississippi Valley and Western Railway Co. v. United States Express Co., 81 Ill. 534; Gilman v. Illinois and Mississippi Telegraph Co., 91 U. S. 603; Sullivan v. Sesson, 2[illegible]3 N. Y. 217.)"

In passing upon a similar question in Dillon v. Ayer, 258 Ill. App. 144, 147, this court stated:

"The rule at common law, and followed by this court, is that the mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession. Moore v. Titman, 44 Ill. 367, 370; Mississippi V. & W. Ry. Co. v. U. S. Express Co., 81 Ill. 534,537; Cross v. Will County Nat. Bank, 177 Ill. 33, 38. To the same effect is Jones on Mortgages, 5th Ed., sec. 670.

"Even if the rents and profits are pledged to secure the mortgage debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents until he takes actual possession or until possession is taken in his behalf by the receiver. Taylor v. Gaman, 239 Ill. App. 569, 574; Anderson v. Fredericksen, 252 Ill. App. 281, 285. To the same effect is John Hancock Mutual Life Ins. Co. v. Watson, 200 Ill. App. 315, 318."

Other contentions have been urged by defendants, but in view of the fact that they do not affect the equities of the case, we deem it unnecessary to discuss them.

Accordingly the decree of sale, the order confirming the sale and distribution and for a deficiency judgment, and the order for the appointment of a receiver are affirmed; and the orders directing the defendants to preserve, keep intact and turn over to the receiver the rents for March and April, 1932, are reversed with directions to the Superior court to vacate and set aside those orders.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

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OPHELIA LOTT,
Defendant in Error,

v.

UNDERWRITERS MUTUAL LIFE INSURANCE COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

272 I.A. 601

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks to reverse a judgment of the Municipal court of Chicago in a fourth class action against it for $400.

Plaintiff's statement of claim is as follows:

"Plaintiff alleges that on January 25th A. D. 1932, the defendant became and was indebted to the plaintiff in the sum of Four Hundred ($400.00) Dollars by virtue of the terms of a certain industrial funeral benefit policy No. F-30742, issued to George Lott, husband of the plaintiff herein, who incurred expenses in the amount named in the policy for the funeral of George Lott, insured herein, who died on the 25th day of January, A. D. 1932.

"Plaintiff further alleges that she has made demand upon the defendant for the sum in question, but the defendant refused and still refuses to pay her the said sum."

The defendant filed an affidavit of merits as follows:

"W. A. White, makes oath and says that he is an officer of the Underwriters Mutual Life Insurance Company, a corp., defendant, in the above entitled cause, and that he verily believes that it has a good defense to this suit, upon the merits to the whole of the plaintiff's demand.

"Affiant further states that the defense of the defendant to said suit is as follows: The plaintiff has failed to allege a cause of action. Plaintiff has failed to perform all conditions precedent within the terms of the policy. Plaintiff is not entitled to recover under the terms of the policy. Further defendant denies that it owes to the plaintiff the sum of Four Hundred ($400.00) Dollars, or any part thereof. Defendant further alleges that plaintiff is not a beneficiary of policy number F30742, for it was assigned by the insured during his lifetime.

"Defendant has performed or offered to perform all the conditions and provisions of the contract of insurance. The defendant is ignorant of the premises as stated in the plaintiff's statement of claim and demands strict proof of each and every material allegation."

[illegible]

[illegible] LNTL,
Defendant-Appellee.

v.

[illegible]
[illegible]
Defendant-Appellee.
Plaintiff-Appellant.

[illegible] 1.A. 601

[illegible]
[illegible]

Defendant by this writ of error seeks to reverse a judgment of the municipal court of Chicago in a tort claim action against it for $600.

Plaintiff's statement of claim is as follows:

"Plaintiff alleges that on January 15th [illegible], 1928, the defendant became and was indebted to the plaintiff in the sum of four hundred (400.00) Dollars by virtue of the terms of a certain industrial insurance benefit policy No. P-[illegible], issued in Illinois law, because of the plaintiff insured, who insured expenses in the amount stated in the policy for the insured at [illegible] law, insured insured, who died on the 12th day of January, in [illegible].

"Plaintiff further alleges that she has made demand upon the defendant for the sum in question, but the defendant refused and still refuses to pay her the said sum."

The defendant filed an affidavit of merits as follows:

"A. A. Tuite, being duly sworn, says that he is an officer of the Universitary Mutual Life Insurance Company, a corporation, in the above entitled cause, and that he verily believes that it has a good defense to this suit, upon the merits to the whole of the plaintiff's demand.

"Affiant further states that the defense of the defendant is as follows: The plaintiff has failed to allege a cause of action. Plaintiff has failed to perform all conditions precedent within the terms of the policy. Plaintiff is not entitled to recover under the terms of the policy. Further defendant denies that it was in the plaintiff the sum of four hundred (400.00) Dollars, or any part thereof. Defendant further alleges that plaintiff is not a beneficiary of policy number [illegible], the [illegible] assigned by the insured during his lifetime.

"Defendant has performed or offered to perform all the conditions and provisions of the contract of insurance. The defendant is ignorant of the premises as stated in the plaintiff's statement of claim and demands strict proof of such and every material allegation."

When this case was reached in the regular course for trial, June 15, 1932, no representative of defendant was present nor was it represented by counsel. The court proceeded with the trial without a jury and after hearing the evidence entered a finding and judgment in favor of plaintiff and against defendant for $400. It does not appear from the record, which includes no bill of exceptions, but from defendant's brief and a certain stenographic report, that on June 24, 1932, defendant presented motions both to vacate the judgment and in arrest of judgment, which were denied by the court.

Defendant contends that the statement of claim was deficient in that it did not state a cause of action. Defendant apparently is not familiar with the rule that in fourth class Municipal court actions the claim is whatever the evidence makes it and that written pleadings are not essential, as this court held in Paris Flouring Co. v. Imperial Cotto Milling Co., 181 Ill. App. 215, and also the Supreme Court in Edgerton v. Chicago, R. I. & P. R. R. Co., 240 Ill. 311. Defendant persists in characterizing the statement of claim as a declaration and its misapprehension in this regard accounts for considerable argument and the citation of numerous cases in its brief which have no application to the law governing the instant case.

Defendant further contends that the insured, the deceased husband of plaintiff, executed an assignment of the policy in question during his lifetime and that therefore plaintiff had no interest in the policy upon which to base her claim. Neither the insurance policy, the purported assignment of same nor any other evidence presented in the trial of this cause has been exhibited by a bill of exceptions or certificate of evidence for review by this court and in the absence of same we must assume that sufficient and proper

evidence was introduced to justify the finding and judgment of the trial court. A stenographic report containing several pages of colloquy between court and counsel on the occasion of the hearing of the motions to vacate the judgment and in arrest of judgment is included in the record filed in this court and this stenographic report is apparently relied upon by defendant as being equivalent to or a satisfactory substitute for a bill of exceptions. We have examined the stenographic report carefully and not a word of evidence is contained therein. This transcript consists of argument and discussion by counsel and it is elementary that neither argument nor talk can take the place or perform the function of evidence.

From the record filed in this court we are unable to discover any error in the trial of this cause. The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

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JOHN SALTIS,
Appellee,

v.

ALBERT J. HORAN, Bailiff of the Municipal Court of Chicago, JAMES E. KENNEDY and EUGENE L. McGARRY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 601[3]

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury a judgment was entered September 28, 1932, finding the right to the property involved in this proceeding in plaintiff as against the defendants Albert J. Horan, bailiff of the Municipal court, James E. Kennedy and Eugene L. McGarry. This appeal followed.

Theretofore defendant Eugene L. McGarry had obtained a judgment against one John Glista and placed an execution in the hands of the bailiff of the Municipal court in pursuance of which he levied upon the property in question which had belonged to Glista.

It appeared that Glista had on April 29, 1932, sometime prior to the entry of judgment against him, executed a chattel mortgage note payable to plaintiff in the instant case for $990, as well as a chattel mortgage to secure same, covering the property levied upon by the bailiff. The claim of plaintiff was based upon his prior lien under the chattel mortgage.

Glista testified that he was indebted to plaintiff; that on the date of the execution of the note and chattel mortgage plaintiff and some unidentified person or persons went to Glista's place

Opinion

JOHN DOLITIS,

Appellee,

v.

ALBERT J. BURKE, Sheriff
of the Municipal Court of
Chicago, Cook Co. Michigan
and JOHNSON L. Bailiff,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

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MR. JUSTICE DUFFY DELIVERED
THE OPINION OF THE COURT.

In a trial before the court without a jury a judgment was entered September 26, 1958, finding the right to the property involved in this proceeding in plaintiff as against the defendants Albert J. Burke, Sheriff of the Municipal court, James J. Bannon and Jurgen L. Bailiff. This appeal follows.

Defendants-petitioners Jurgen L. Bailiff had obtained a judgment against one John Gilbo and placed an execution in the hands of the Sheriff of the Municipal court in pursuance of which he levied upon the property in question which had belonged to Gilbo.

It appeared that Gilbo had on April 22, 1958, months prior to the entry of judgment against him, executed a chattel mortgage note payable to plaintiff in the instant case for $[illegible], as well as a chattel mortgage to secure same, covering the property levied upon by the Sheriff. The claim of plaintiff was based upon his prior lien under the chattel mortgage.

Gilbo testified that he was indebted to plaintiff and on the date of the execution of the note and chattel mortgage plaintiff had some unidentified person or persons want to Gilbo's place

of business; the documents were prepared and he signed the note and chattel mortgage.

Defendants contend that the chattel mortgage executed by Glista to secure his note to plaintiff was invalid because it failed to comply strictly with the provisions of the statute. Ch. 95, sec. 2, of Cahill's Ill. Rev. St., relating to chattel mortgages, provides as follows:

"ACKNOWLEDGMENT. Such instruments shall be acknowledged before the county judge, or any justice of the peace of the county in which the mortgagor resides, or before the clerk or any deputy clerk of the district of the Municipal Court of the City of Chicago in which the mortgagor resides, or, if the mortgagor is not a resident of the State at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds: Provided, however, that in counties having a population of more than two hundred thousand, such instrument, if the mortgagor is a resident of the State at the time of making the acknowledgment, shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, or if there be no justice of the peace of the town or precinct where the mortgagor resides or if there be no justice of the peace in such town or precinct such instrument shall be acknowledged before the clerk or any deputy clerk of the Municipal Court in the district in which the mortgagor resides; or if there be no such clerk or deputy clerk, before the county judge of the county in which the mortgagor resides: Provided further, that such acknowledgment may be made either by the mortgagor or a person duly authorized by said mortgagor to act as his attorney in fact."

The power of attorney authorizing another to act as his attorney in fact in making the acknowledgment had subscribed to it the signature, John Glista; was acknowledged before a notary public and was in the following form:

"I John Glista, the mortgagor, do hereby make, constitute and appoint John F. O'Toole attorney in fact, to appear for me and in my behalf before _____ and acknowledge the execution of the within instrument in my name and for me for all purposes as I might do, with the same force and effect.

Given under my hand and seal this 29th day of April, A.D. 1932.

(signed) John Glista

State of Illinois)
County of Cook)SS

I, John A. Goetz a notary Public, in and for said County in the State aforesaid, do hereby certify that John Glista personally known to me to be the person whose name is subscribed to the foregoing

of business; the documents were prepared and be signed and made and duplicate originals.

Furthermore, instead that the contract mortgage executed by Gilbis to secure his note to plaintiff was invalid because it failed to comply strictly with the provisions of the statutes.

The M. and Ty. of Gilbis's Code, relating to chattel mortgages, provides as follows:

"ACKNOWLEDGMENT. Such instruments shall be acknowledged before the county judge, or any justice of the peace of the county in which the mortgagor resides, or before the clerk of any county clerk of the district of the Municipal Court of the city of Chicago in which the mortgagor resides, or, if the mortgagor is not a resident of the state at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds. Principal Purpose. What is consider having a presumption of were then for certain purposes, such instrument, if the mortgagor is a resident of the state at the time of making the acknowledgment, shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides. If there be no justice of the peace or precinct where the mortgagor resides or if there be no judge of the county in this or any other state or country where such instrument shall be acknowledged before a justice of the peace or notary public or the clerk of the county in which the mortgagor resides, or if there be no such clerk or county clerk, before the county judge of the county in which the mortgagor resides. Provided further, that such acknowledgment may be made either by the mortgagor or a person duly authorized by said mortgagor to act as his attorney in fact."

The power of attorney authorizing another to act as his attorney in fact in making the acknowledgment had subscribed to it the signature, John Gilbis, was acknowledged before a notary public and was in the following form:

"I John Gilbis, the mortgagor, do hereby make, constitute and appoint John T. O'Donnell attorney in fact, to appear for me and in my behalf before _____ and acknowledge the execution of the within instrument in my name and for me in all particulars as I might do, with the same force and effect.

Given under my hand and seal this 17th day of April, ...

Witness:

[signed] John Gilbis

State of Illinois }
County of Cook }ss.

I, John A. Doyle a notary public, do and for said county in the state aforesaid, do hereby certify that John Gilbis personally known to me to be the person whose name is subscribed to the foregoing

instrument, came before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the purposes and uses therein set forth.

Given under my hand and Notarial seal this 29th day of April A. D. 1932.

(signed) John A. Goetz,
Notary Public.

(Notarial)
(Seal)"

Defendants insist that plaintiff's claim should have been disallowed on the ground that the chattel mortgage was invalid as to parties not privy to it because the power of attorney on the reverse side of the chattel mortgage failed to designate the person or officer before whom the attorney in fact should appear and acknowledge the execution of the instrument. The form used for the execution of the power of attorney was the form prescribed in the statute and it is apparent that the name of the acknowledging officer was inadvertently omitted in drawing up the instrument. The chattel mortgage was properly acknowledged May 2, 1932, within the ten days provided by law, before Jos. L. Gill, clerk of the Municipal court.

The cases cited and relied upon by defendants to sustain their contention are readily distinguishable from the case at bar. In Krysiak v. Egan, 243 Ill. App. 313, the court held that there was no acknowledgment of the power of attorney. In Lyons v. Peoples Bank of Lexington, 317 Ill. 44, the chattel mortgage acknowledgment was taken by a justice of the peace of another town than the one in which the mortgagor resided. In Fisher v. Bollman, 258 Ill. App. 461, neither the mortgagor nor any attorney in fact acting for him acknowledged the mortgage before the justice of the peace. In all of these cases a substantial failure to comply with the material provisions of the Chattel mortgage act was shown.

In our opinion the omission of the name and title of the officer before whom the mortgage was to have been acknowledged did

instrument, some hold the title only in persons who acknowledge such an element, meaning that delivered the until instrument as his free and voluntary act for the purposes and uses therein set forth. Given under my hand and notarial seal this 12th day of April, A. D. 1941.

(signed) John A. Sheets,
Notary Public.

(Notarial
Seal)

Defendants insist that plaintiff's claim should have been dismissed on the ground that the chattel mortgage was invalid as a matter not prior in it because the power of attorney in the mortgage lack of the chattel mortgage failed to constitute the person an officer before whom the attorney in fact should appear and acknowledge the execution of the instrument. The trial court ruled the execution of the power of attorney was the same performed in the manner and in the instrument that the same of the acknowledgment officer was instrumental matter in drawing up the instrument. The chattel mortgage was properly acknowledged July 7, 1931, within the time days provided by law, before Jos. A. Sheets of the Municipal court.

The cases cited and relied upon by defendants to sustain their contention are readily distinguishable from the case at bar. In Kirchek v. Ryan, 143 Ill. App. 310, the court held that there was no acknowledgment of the power of attorney. In Lyons v. Dearborn Bank of Evanston, 217 Ill. 44, the chattel mortgage acknowledgment was taken by a justice of the peace of another town than the one in which the mortgagor resided. In Fisher v. Dolman, 119 Ill. App. 463, neither the mortgagee nor any attorney in fact acting for him acknowledged the mortgage before the justice of the peace. In all of these cases a substantial failure to comply with the material provisions of the chattel mortgage act was shown.

In our opinion the omission of the name and title of the officer before whom the mortgage was to have been acknowledged did

not invalidate it, inasmuch as the name and title of but one official could properly have been inserted as the acknowledging officer in the space on the printed form that was not filled in and that was the name and title of the clerk of the Municipal court, the only person or official with authority under the law to take acknowledgments of chattel mortgages in the city of Chicago. The mortgage in question was properly executed, the power of attorney was signed and acknowledged, the mortgage was acknowledged before the proper officer and recorded with the proper officer and, notwithstanding the general rule that the statute, being in derogation of the common law must be strictly construed, we are of the opinion that the failure to insert the name and title of the acknowledging officer was an error of form and not of substance that neither injured nor misled the defendants as to any right they may have had in or to the property in question, and that there was a substantial compliance with the provisions of the Chattel Mortgage act.

In the case of Greenwald v. Lee, 252 Ill. App. 184, 193, where the justice of the peace who acknowledged the mortgage did not sign his name on the blank line provided for that purpose on the printed form, and the words "entered by me" contained in the statutory form were omitted from the certificate, the court allowed proof of the acknowledgment from the docket entries of the justice and held there was a substantial compliance with the statute and that such omissions did not invalidate the mortgage. After a review of the law on the subject the court in its opinion in that case held:

> "While the general rule is that the provisions of the Chattel Mortgage Act are mandatory, a review of the decisions, announcing that rule, shows that its application concerns only substantial departures from the requirements of the statute. The exceptions to the rule are as well established as the rule itself."

The defendants further contend that no proof was made as to

one invalidate the instrument on the ground that the name and title of the officer acknowledging the mortgage was not inserted in the acknowledgment, if it appeared from the printed form that the officer in and for the county where the mortgage was acknowledged was the same person who was the clerk of the municipal court, the only person or official with authority under the law to take acknowledgments of chattel mortgages in the city of Chicago. The mortgage in question was properly attested, the power of attorney was signed and acknowledged, the mortgage was acknowledged before the proper officer and recorded with the proper officer, substantially the precisely with the statute, being in strictness of the phrase we are so accustomed, we are of the opinion that the failure to insert the name and title of the acknowledging officer was an error of form and not of substance that neither injured nor misled the defendants as to any rights they may have had in or to the property in question, and that there was a substantial compliance with the provisions of the Chattel Mortgage act.

In the case of Ferrewald v. Ibid. 202 Ill. App. 194, 195, where the justice of the peace who acknowledged the mortgage did not affix his name on the blank line provided for that purpose on the printed form, and the words "entered by me" contained in the statutory form were omitted from the certificate, the court stated proof of the acknowledgment from the latter portion of the jurat and held there was a substantial compliance with the statute and that such omissions did not invalidate the mortgage. After a review of the law on the subject the court in its opinion in that case said:

"While the general rule is that the provisions of the Chattel Mortgage act are mandatory, a review of the decisions evinces that such rule, where that its application concerns only substantial departures from the requirements of the statute, the exceptions to the rule are as well established as the rule itself."

The defendants further contend that no proof was made as to

Olista's signature to the power of attorney. The witness, Olista, identified his signature to the note and chattel mortgage and those documents were received in evidence. He was not interrogated either on direct or cross-examination concerning his signature to the power of attorney on the reverse side of the chattel mortgage and, inasmuch as that entire document was in evidence and the power of attorney had subscribed to it a signature which purported to be Olista's, the trial court was justified in finding that it was his signature.

For the reasons indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

36464

5 A

DOLORES HERNANDEZ,
Appellee,

v.

ALBERT J. MORAN, Bailiff
of the Municipal court of
Chicago,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

272 I.A. 601

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff against Albert J. Moran, bailiff of the Municipal court of Chicago, to recover damages for trespass under ch. 52, par. 17, Cahill's Rev. St. of Illinois, which provides as follows:

"If any officer, by virtue of any execution or other process, or any other person by any right of distress shall take or seize any of the articles or property exempted as herein provided from levy and sale, such officer or person shall be liable to the party injured for double the value of the property so illegally taken or seized, to be recovered by action of trespass with costs of suit."

Plaintiff was the defendant in a distress for rent proceeding in which one Mrs. I. Spirkel recovered a judgment against her for $147 and costs, upon which judgment a general and special execution in distress was issued by virtue of which defendant as bailiff of the Municipal court levied upon the distrained property of plaintiff, Dolores Hernandez. Plaintiff herein contested the distress for rent proceeding and at that time filed no schedule claiming her exemption within ten days from the service of the distress warrant upon her in that cause, but did within ten days after the service of the general and special execution upon her file a schedule claiming all of the property involved in this cause as and for her exemption. All of this property was sold by

[illegible]

[illegible]

[illegible]

the bailiff notwithstanding that plaintiff had filed her schedule claiming exemption within ten days after the service of the execution as provided in ch. 52, par. 14 of Cahill's Rev. St.

This cause proceeded to trial before the court without a jury and a finding and judgment was entered in favor of plaintiff for $600, from which judgment defendant prosecutes this appeal.

In the trial court the defense was made in part on the theory that under the statute plaintiff (defendant in distress for rent proceeding) was entitled to but one opportunity to claim her exemption and that having failed to file her schedule within ten days from the service of the distress warrant she had waived her right to exemption and could not avail herself thereof by filing a schedule upon service of the general and special execution. Defendant concedes on this appeal that this theory was based on a misapprehension as to the law and that plaintiff filed her schedule claiming exemption within apt time.

Ch. 52, par. 13, dealing with exemptions and those entitled to claim same contains the following provision:

"That the following personal property, owned by the debtor shall be exempt from execution, writ of attachment and distress for rent, viz: - One hundred dollars worth of property, to be selected by the debtor, and in addition when the debtor is the head of a family and resides with the same, three hundred dollars worth of other property, to be selected by the debtor."

It will be noted that the statute provides exemption to the extent of $100 of personal property for judgment debtors and that in addition, where the judgment debtor is the head of a family residing with same, he is entitled to an additional exemption of $300.

The schedule filed by plaintiff declared that she was the head of a family consisting of three sisters, but the words "and resides with same in said city" were stricken from the printed form of schedule affidavit furnished by the bailiff for the purpose

and subscribed to by her. Although the evidence disclosed that she was not the head of a family within the meaning of the statute, it is obvious that she or the person who advised her or drew up the schedule for her undoubtedly intended to convey the impression that as the head of a family she was entitled to the $400 exemption. Plaintiff testified that she was not married at the time the distress warrant was served upon her and that she was single at the time she filed her schedule to claim exemption following the service of the execution. She further testified that her three sisters lived in Mexico at the time she filed the schedule and are still living there.

Defendant contends that the schedule affidavit filed by plaintiff and her own evidence precluded the allowance to her of any claim of exemption in excess of $100 and that the most the court could allow her by way of damages or penalty in this cause would be double that amount as provided by statute, or $200.

At the conclusion of all the evidence the trial court specifically found that plaintiff was not the head of a family residing with same and announced the finding and judgment of the court in the following language: "And I cannot do more than to enter judgment for $200 which I will do." Almost immediately thereafter the court announced its finding and judgment against the defendant for $600.

There is no contention on the part of plaintiff that she was entitled under the law to any more than $100 exemption had she filed a truthful schedule affidavit. If there had been no misapprehension as to the law by defendant, and if he had proceeded with the appraisement of the property levied upon in accordance with the statute, the most that plaintiff would have been entitled to receive by way of exemption would be $100 worth

of the property selected by her at the values placed on the various articles of property by the appraisers and the court was not warranted in entering judgment for more than double that amount, or $200.

It cannot be urged that the sale by the bailiff of the property involved in this case was wrong in toto, but at best plaintiff may urge that the bailiff's sale was unlawful as to $100 worth of her property which is the maximum exemption which could possibly have been allowed her in accordance with her schedule and in accordance with her testimony.

An examination of the statute upon which this act is based leads us inevitably to the conclusion that it was intended to apply to seizure and sale of property lawfully exempt and that the officer or person seizing same shall be liable to the owner thereof "for double the value of the property so illegally taken or seized." In our opinion it never was intended that a person should be awarded as damages double the value of such property as he might see fit to claim as exempt, regardless of whether the same was in fact properly the subject of exemption, merely because such property was levied upon or sold by a judicial officer. We think that the purpose of the act is to protect the judgment debtor by making a judicial officer who has disregarded a proper claim for exemption respond in damages in an amount double said exemption.

Plaintiff contends that defendant is precluded on this appeal from assigning errors of law occurring during the trial of this cause by reason of the fact that he did not present written propositions of law to the trial court. There is no merit in this contention and the cases cited by plaintiff in support of same are readily distinguishable from the case at

bar. The bill of exceptions discloses that all points urged by defendant on this appeal have been properly preserved for review. Other contentions have been urged, but in the view we take of the case we deem it unnecessary to discuss them.

It is ordered and adjudged by this court that if plaintiff shall file a remittitur of $400 with the clerk of this court within ten days the judgment of the Municipal court be affirmed for $200; if such remittitur be not filed said judgment be reversed and the cause remanded.

AFFIRMED ON REMITTITUR FOR $400;
OTHERWISE REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

36514

ARTHUR L. JOHNSON, Appellee,	)	
vs.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
MEYER A. BLOCK, Appellant.	)	

6 7

272 I.A. 602[1]

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks the reversal of an order entered by the Circuit court December 1, 1932, vacating a judgment entered March 31, 1932, dismissing the case for want of prosecution.

The cause was at issue, and in compliance with Rule 23 of the court plaintiff's attorney caused a notice and affidavit to place the case on the trial calendar to be served on the defendant's attorney, which notice and affidavit were filed with the clerk of the Circuit court August 31, 1931. While this notice was in full force and effect plaintiff's attorney filed a similar notice and affidavit for trial, January 2, 1932. No objections were filed to either notice to place the cause on the trial calendar.

Both notices were filed too late for the case to be included in the printed law calendar for the September, 1931, term of court and the case appeared for the first time on Supplemental Calendar No. 1, which was prepared and printed for the February, 1932, term of court. It appeared in two places on this calendar - as No. 8 on Calendar No. 1 of cases assigned to Judge David M. Brothers and again as No. 131 on Calendar No. 2 of cases assigned to Judge William V. Brothers.

In the latter part of March, 1932, Judge David M. Brothers began calling cases from his Supplemental Calendar No. 1, and this case after appearing on the trial call for several days was dismissed March 31, 1932, for want of prosecution. Case No. 131 on Judge William V. Brothers' Supplemental Calendar No. 2 had not been

70014

ARTHUR L. JACKSON,

Appellant,

vs.

ARTHUR L. BLACK,

Respondent.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE MULLINS

DELIVERED THE OPINION OF THE COURT.

This appeal brings into reviewed of an order entered by the Circuit court December 1, 1932, granting a judgment notwithstanding the verdict, dismissing the case for want of prosecution.

The cause was at issue, and in compliance with Rule 22 of the court plaintiff's attorney mailed a notice and affidavit to place the case on the trial calendar to be entered on the defendant's attorney, which notice and affidavit were filed with the clerk of the circuit court August 21, 1931. While this notice was in full force and effect plaintiff's attorney filed a similar notice and affidavit for trial, January 2, 1932. No objections were filed to either notice to place the cause on the trial calendar.

Both notices were filed too late for the case to be included in the printed jury calendar for the September, 1931, term of court and the case appeared for the first time on Supplemental Calendar No. 1, which was presented and printed for the February, 1932, term of court. It appears by the pleadings in this proceeding - as fol. 2 in Calendar No. 1 of trial cause assigned to Judge Dwight H. Stephens and again on fol. 141 on Calendar No. 6 of cause assigned to Judge William T. Sherwood.

In the latter part of March, 1932, Judge Dwight H. Stephens began calling cases from the Supplemental Calendar No. 1, and this case after appearing on the trial call for several days was dismissed March 31, 1932, for want of prosecution. Case No. 141 on Judge William T. Sherwood's Supplemental Calendar No. 6 had not been

reached at the time of the entry of the order appealed from.

No further action was taken in the case until September 17, 1932, when plaintiff served notice on counsel for defendant of a motion to vacate the judgment theretofore entered, dismissing the case for want of prosecution. This motion was not in writing.

On December 1, 1932, plaintiff presented in support of the motion to vacate the petition of one Raymond Lowitz, which alleged that he was a law clerk in the office of counsel for plaintiff and that it was his duty to watch and check the various cases in the office and to check the office calendar daily as well as the daily Law Bulletin for the purpose of determining when the cases of their office were reached for trial; that he found this case listed as No. 131 on Judge William V. Brothers' Supplemental Calendar No. 2 and, believing that that was the only calendar on which the case would appear, did not look further (the case did appear in the Law Bulletin on Judge David W. Brothers' Supplemental Calendar No. 1); and he did not discover that the case appeared as No. 8 on Calendar No. 1 of Judge David M. Brothers until December 6, 1932, when he found that it had been dismissed on March 31, 1932.

The court sustained the motion and set aside the judgment dismissing the case for want of prosecution over the objection of defendant.

Defendant contends that the trial court had no jurisdiction to set aside this judgment after the expiration of the term at which it was entered; that the motion having been made orally did not comply with requirements of Section 89 of the Practice act and could not be regarded as a motion in the nature of a writ of error <u>coram nobis</u>; and that the facts set up in the petition were not sufficient to support a motion under Section 89 of the Practice act, even if properly made.

The courts of review of this state have uniformly held that

vacated at the time of the entry of the order appealed from.

No further action was taken in the case until September 17, 1932, when plaintiff served notice on counsel for defendant of a motion to vacate the judgment theretofore entered, dismissing the case for want of prosecution. This motion was set in writing.

On December 1, 1932, plaintiff presented in support of the motion to vacate the position of one Raymond Lovitt, which alleged that he was a law clerk in the office of counsel for plaintiff and that it was his duty to watch and check the various cases in the office and to check the office calendar daily as well as the daily Law Bulletin for the purpose of determining when the cases of that office were reached for trial; that he found this case listed as No. 182 on Judge William V. Brothers' Supplemental Calendar No. 2 and, believing that that was the only calendar on which the case would appear, did not look further (the case did appear in the law Bulletin on Judge David V. Brothers' Supplemental Calendar No. 1); and he did not discover that the case appeared as No. 8 on Calendar No. 1 of Judge David R. Brothers until December 6, 1932, when he found that it had been dismissed on March 22, 1932.

The court sustained the motion and set aside the judgment dismissing the case for want of prosecution over the objection of defendant.

Defendant contends that the trial court had no jurisdiction to set aside this judgment after the expiration of the term at which it was entered; that the motion having been made orally did not comply with requirements of Section 22 of the Practice Act and could not be treated as a motion in the nature of a writ of error coram nobis; and that the facts set up in the petition were not sufficient to support a motion under Section 72 of the Practice Act, even if strictly made.

The courts of review of this state have uniformly held that

after the expiration of the term of court at which a judgment is entered, the court has no authority to set aside the judgment for alleged errors of law or to enter any further orders in the case. This rule applies to a judgment dismissing a case for want of prosecution with the same force as to other judgments.

The only exceptions to the above rule are set forth in Hickman v. Ritchey Coal Company, 252 Ill. App., 560, 562, 563, where the court said:

"The law is well settled that the court is without authority to set aside a judgment, on motion made at a subsequent term, except in the following cases: where it is by consent of the parties; where the judgment is absolutely void, and where the motion is made under section 89 of the Practice Act, Cahill's St., ch. 110, Par. 89. After the term has expired, a court has no authority on a motion made at a subsequent term to set aside the judgment, but may amend it in mere matter of form, after notice has been given to the opposite parties. Cook v. Wood, 24 Ill. 295; Cramer v. Commercial Men's Ass'n, 263 Ill. 316. Where a cause was dismissed for want of prosecution and it was reinstated at a subsequent term, it was held that the court was without jurisdiction to reinstate it. Smith v. Wilson, 26 Ill. 186.***

It is apparent, therefore, that the motion to set aside the original order of dismissal cannot be allowed unless the motion is sufficient to bring the case within section 89 of the Practice Act, Cahill's St., ch. 110, Par. 89."

There is no contention that the order vacating the judgment and reinstating the case after the expiration of the term was entered with the consent of the parties, or that the judgment was absolutely void. Therefore the order must be shown to have been entered in full compliance with Sec. 89 of the Practice act.

The facts in the case at bar are sufficiently similar to those in the Hickman case, supra, as to make the reasoning of and conclusions reached by the court in that case applicable to this case. At pages 563 and 564 of that decision the court used this language:

"A motion under section 89 of the Practice Act, Cahill's St. ch. 110, Par. 89, must set up and rely upon such a fact or facts as do not appear upon the record and are unknown to the court, and which, if known, would have precluded the rendition of the judgment. People ex rel. O'Connell v. Noonan, 276 Ill. 430.***

after the application of the term of court to which a judgment is entered, the court has no authority to set aside the judgment for illegal errors of law or to alter any further orders in the cause. This rule applies to a judgment dismissing a case for want of prosecution when the same terms as in other judgments.

The only exceptions to the above rule are set forth in [illegible] v. United Rail Shippers, 222 Ill. App., 300, 301, 302, where the court said:

"The law is well settled that the power to vacate authority is not limited to a judgment, an action made at a subsequent time, nunc pro tunc, is void. There is no by exercise of the constant power the judgment is absolutely void, and there the action is made under section 68 of the Practice Act, Smith's St., ch. 110, par. 68. After the term has ended, a court has no authority on a motion made at a subsequent term to set aside the judgment, but may [illegible] it to nunc entry of term, either motion for [illegible] to the opposite parties. Cook v. Cook, 24 Ill. 268; Cooper v. Commercial Nat'n Ass'n, 202 Ill. 321. Under a power not inherent in the court of procedure and it was retained of a subsequent term, it was held that the court was without jurisdiction to retaxate it. Smith v. Wilson, 88 Ill. 244.

It is apparent, therefore, that the motion to set aside the original order of dismissal cannot be entered unless the motion is filed, the case within section 68 of the Practice Act, Smith's St., ch. 110, par. 68."

There is no contention that the order vacating the judgment and reinstating the case after the expiration of the term was entered with the consent of the parties, or that the judgment was absolutely void. Therefore the order must be shown to have been entered in full compliance with Sec. 68 of the Practice Act.

The facts in the case at bar are sufficiently similar to those in the Gleason case, supra, as to make the reasoning of and conclusions reached by the court in that case applicable to this case. At pages 223 and 224 of that decision the court used this language:

"A motion under section 68 of the Practice Act, Smith's St., ch. 110, par. 68, must set up and rely upon such a fact or facts as do not appear upon the record and are unknown to the court, and which, if known, would have prevented the rendition of the judgment. Pacific ex rel. O'Donnell v. Stamps, 276 Ill. 430."

"The motion under section 89 of the Practice Act, Cahill's St. ch. 110, Par. 89, is for the sole purpose of correcting such errors of fact, which, by the common law, could have been corrected by a writ of error coram nobis. The statute so provides. The motion will not lie where the party complainant knew the facts complained of at the time of or before the trial, or by the exercise of reasonable diligence, might have known them, or is otherwise guilty of negligence in the matter, or when advantage could have been taken of the alleged error at the trial. 5 Encyc. Pl. & Pr. 29; 34 C. J. 394; Mitchell v. Hareckson, 250 Ill. App. 508. The motion is not intended to relieve a party from the consequences of his own negligence. Loew v. Krauspe, 320 Ill. 244; Cramer v. Commercial Men's Ass'n, 260 Ill., 516."

The only irregularity alleged in the petition filed in support of the motion to vacate the dismissal was the listing of the case on the calendar of Judge William V. Brothers, to whom it had not been assigned. Even had this improper listing been known to Judge David M. Brothers at the time judgment of dismissal was entered, it would not have precluded the rendition of the judgment.

Plaintiff's attorney filed two notices to place the case on the trial call where only one was necessary, and his filing of the second notice for trial without withdrawing the first one or having it stricken was undoubtedly largely responsible for the mistake of the clerk in placing the case on two trial calendars.

By the exercise of reasonable diligence plaintiff's attorney must have known that the case had been on the calendar of Judge David M. Brothers since the date of its filing, and that its presence on another calendar was irregular. That fact in itself should have at least put him on notice to investigate and rectify the mistake that had been made by the clerk of the court in placing the case on the calendar of Judge William V. Brothers as well as on the calendar to which it had been regularly assigned.

For plaintiff's attorney to urge that he was misled concerning something of which a diligent lawyer would have had positive knowledge, is simply to assert that he did not exercise ordinary care in keeping track of the case.

The motion under analysis, if of the direction not, Cohen's 22, ch. 116, Par. 68, is for the sole purpose of interpleading some error of fact, which, by the common law, would have been corrected by a writ of error before entry. The statute is strictive. The motion will not lie where the party complained were the trial judge plaintiff or in view of or before the trial, or by the exercise of reasonable diligence, could have taken them, as in mitigation of quality of evidence in the matter, or from information which has been taken of the attorney of the trial. 2 Chapp. Pl. c. 17, 28; 2a c. 1, 1341; Kimmell v. Jefferson. 69 Ill. App. 302. The motion is not intended to relieve a party from the consequence of his own negligence. Lane v. Kingman. 100 Ill. 641; Stewart v. Chicago Medical Society. 100 Ill., 114.

The only irregularity alleged in the petition filed in support of the motion to vacate the dismissal was the listing of the case on the calendar of Judge William V. Brentano, to whom it had not been assigned. Even had this improper listing been known to Judge David S. Kostner at the time judgment of dismissal was entered, it would have prevented the evaluation of the judge.

Plaintiff's attorney filed two motions to place the case on the trial call where only one was necessary, and his filing of the second motion for trial without withdrawing the first one or having it stricken was undoubtedly largely responsible for the misfeasance of the clerk in placing the case on two trial calendars.

By the exercise of reasonable diligence plaintiff's attorney must have known that the case had been on the calendar of Judge David S. Kostner since the date of its filing, and that its presence on another calendar was irregular. That fact in itself should have at least put him on notice to investigate and rectify the mistake that had been made by the clerk of the court in placing the case on the calendar of Judge William V. Brentano as well as on the calendar to which it had been regularly assigned.

For plaintiff's attorney to argue that he was misled concerning something of which a different lawyer would have had positive knowledge, is simply to assert that he did not exercise ordinary care in keeping track of his case.

When plaintiff's counsel discovered that the cause had been dismissed for want of prosecution, he found himself in a situation from which it was legally impossible to extricate himself; the term had expired long since, and the case had been dismissed on the call of a calendar to which it had been regularly assigned and reassigned.

If the facts in the case were such as to bring the motion within the purview of Section 89 of the Practice act, the record discloses an absolute failure to comply with the provisions of that act. A motion to avail under that section must be made in writing by the party to the proceeding or his attorney acting for and in his behalf, and is in effect a declaration in a new cause of action.

The motion to vacate the judgment of dismissal in this case was made orally and there was no attempt to support it by a petition of plaintiff or plaintiff's attorney. In addition to the oral motion all that the record discloses is the petition of a clerk in the office of plaintiff's attorney. This was clearly insufficient and could not under any circumstances be considered as such a motion in writing as the statute contemplated.

For the reasons indicated herein we are of the opinion that the court erred in entering the order vacating the judgment dismissing the cause for want of prosecution, and the order of the Circuit court is therefore reversed.

REVERSED.

Gridley and Scanlan, JJ., concur.

Upon plaintiff's counsel discovering that the cause had been dismissed for want of prosecution, he (counsel) in a situation from which it was highly improbable to extricate himself; the term had expired long since, and the case had been dismissed on the call of a calendar in which it had been regularly docketed and assigned.

If the facts in the case were such as to bring the action within the purview of section 49 of the Practice act, the record discloses no absolute failure to comply with the provisions of that sec. A motion in arrest under that section must be made in writing by the party to the proceeding or his attorney making for and in his behalf, and is in effect a demurrer in a new cause of action.

The motion to vacate the judgment of dismissal in this case was made orally and there was no attempt to support it by a petition of plaintiff or plaintiff's attorney. In addition to the oral motion all that the record discloses is the particular of a claim in the office of plaintiff's attorney. This was clearly insufficient and could not under any circumstances be considered as such a motion in writing as the statute contemplated.

For the reasons indicated herein we are of the opinion that the court erred in entering the order vacating the judgment dismissing the cause for want of prosecution, and the order of the circuit court is therefore reversed.

REVERSED.

Barnhy and Lawson, JJ., concur.

36557

FRED FLOTKE,
Appellee,

v.

LIBBIE GREENBERG et al.,
Defendants.

In re petition of CHICAGO TITLE & TRUST COMPANY, as successor trustee, Intervening Petitioner,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

272 I.A. 602

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks the reversal of an order of the Circuit court denying motion of Chicago Title & Trust Company, intervening petitioner, that Irving Berman, who had theretofore been appointed receiver upon the filing of a bill to foreclose the lien of a second mortgage, be directed to deliver possession of the premises to it as successor trustee under a trust deed securing a first mortgage on the same premises, together with all rents collected by the receiver after the date of the filing of the intervening petition.

By order of court the Chicago Title & Trust Company (hereinafter referred to as petitioner), as successor trustee, filed an intervening petition in the action of Fred Flotke v. Libbie Greenberg et al., and the receiver and parties were ordered to answer. The bill of complaint in this action was filed August 12, 1932, to foreclose a junior mortgage of $2100 and Berman was appointed receiver.

[illegible]

[illegible]

[illegible]

The intervening petition alleged that the petitioner was the duly qualified and acting successor trustee under a trust deed securing an issue of bonds in the total amount of $42,000. It further alleged that two of the bonds, in the amount of $1000 had been paid, but that there had been a default in the interest due April 4, 1932, and in two bonds due on that day, in the amount of $1000, and alleged that by reason of these defaults, the appropriate parties in accordance with the terms of the trust deed had declared the entire principal indebtedness due and had notified the successor trustee to proceed to enforce the rights of the bondholders under the trust deed. It then alleged that the petitioner had filed a bill to foreclose the trust deed in the Superior court on September 15, 1932. The petition set forth that the trust deed provided that in case of default the trustee might, in its discretion, enter upon and take possession of the mortgaged property. The petition alleged that the trust deed being foreclosed by the complainant was junior and subordinate to the trust deed under which the petitioner was successor trustee; that the latter trust deed was a valid first lien upon the premises; that Irving Berman, receiver, was in possession of the premises but that the intervening petitioner as successor trustee elected to take possession; and that this right was a substantial right, vital to the protection of the security intended to be effected by the trust deed mentioned in the intervening petition. The petition prayed that the receiver be directed to surrender possession of the premises to the intervening petitioner, together with the rents collected after the date of the filing of the intervening petition.

At the hearing petitioner offered to prove each of the allegations of the intervening petition, but the court sustained objections to each of the offers of proof. Petitioner contends

The intervening petition alleged that the petitioner was the duly qualified and acting secretary-treasurer under a trust deed securing an issue of bonds in the total amount of $40,000. It further alleged that two of the bonds, in the amount of $1000 had been paid, but that there had been a default in the interest due April 4, 1921, and in the bonds due on that day, in the amount of $2000, and alleged that by reason of these defaults, the appropriate portion in accordance with the terms of the trust deed had declared the entire principal indebtedness due and had notified the mortgagor trustee to proceed to enforce the rights of the bondholders under the trust deed. It also alleged that the petitioner had filed a bill to foreclose the trust deed in the Superior court on September 1, 1920. The petition put forth that the trust deed provided that in case of default the trustee might, in the discretion, enter upon and take possession of the mortgaged property. The petition alleged that the trust deed being foreclosed by the complainant was junior and subordinate to the trust deed under which the petitioner was concerned; that the latter trust deed was a valid first lien upon the premises; that irving Berman, trustee, was in possession of the premises; that the intervening petitioner is a resident trustee elected to take possession; and that this right was a substantial right, vital to the protection of the security intended to be afforded by the trust deed mentioned in the intervening petition. The petition prayed that the receiver be directed to surrender possession of the premises to the intervening petitioner, together with the rents collected after the date of the filing of the intervening petition.

In the hearing petitioner offered to prove each of the allegations of the intervening petition, but the court sustained objections to each of the offers of proof. Petitioner contends

that, as successor trustee under the first mortgage, it had alleged facts sufficient to entitle it to possession of the premises and that upon proof of these facts it is entitled to have possession of the premises delivered to it.

This court has consistently held that the appointment of a receiver in a proceeding to foreclose a second mortgage can only be made without prejudice to the right of the first mortgagee to the possession of the premises upon default if he sees fit within a reasonable time to assert that right. Altschuler v. Sandelman, 264 Ill. App. 106, which was decided by this court in 1931 announced this rule, which has been adhered to since that time. In that decision the court cited the following pertinent pronouncement of our Supreme court in Rohrer v. Deatherage, 336 Ill. 450, 454, 455:

"After condition broken, however, the mortgagee is, as between him and the mortgagor, the owner of the fee. (Ladd v. Ladd, 252 Ill. 43; Ware v. Schintz, 190 id. 189; Vaughop v. Bartlett, 165 id. 124; Baker v. Heffernan, 159 id. 38; Oldham v. Pfleger, 84 id. 102.) * * * Upon default in the condition of the mortgage the mortgagee has the right to possession against the mortgagor, his grantee, lessee or anyone claiming under him by any right."

The law controlling the right of a trustee under a trust deed securing a first mortgage to take possession of the premises upon default from the receiver in a second mortgage foreclosure proceeding was reiterated in the case of Consumers Bond & Mortgage Co. v. Padin, 266 Ill. App. 141, 148-9, where the court said:

"In the recent case of Altschuler v. Sandelman, 264 Ill. App. 106, we held that the appointment of a receiver to take charge of mortgaged premises under a junior mortgage does not destroy the right of a prior mortgagee to take possession; that there is no merit in the contention that the latter can then only have the receivership extended as to it, and that it is error to dismiss, for want of equity, an intervening petition demanding that a receiver, appointed at the instance of a junior mortgagee, surrender possession to a first mortgagee; that there is no material difference or distinction between the

rights of a first mortgagee in possession of premises prior to an appointment or attempted appointment of a receiver at the instance of a junior mortgagee, and the rights of a first mortgagee not asserted until after a receiver had been appointed and is in possession at the instance of a junior mortgagee; and that the appointment of a receiver at the instance of a junior mortgagee can only be made without prejudice to the right of the first mortgagee to the possession of the premises, if he sees fit within a reasonable time to assert that right. In that case the law bearing upon the important questions involved is cited at considerable length, and after a further consideration of the matter we adhere to the conclusions therein reached."

There is no doubt as to the sufficiency of the intervening petition and the refusal of the court to grant the prayer of that petition without considering any evidence and, after declining to hear evidence offered in support of each allegation of the petition, constituted a denial of rights to which the petitioner was entitled.

The order or judgment of the Circuit court denying the prayer of the intervening petition that the receiver be directed to surrender possession of the premises to the intervening petitioner, together with rents collected from the date of the filing of the intervening petition, is reversed, and the cause is remanded with directions to the Circuit court to enter an order directing the receiver to deliver possession of the premises to the intervening petitioner and to account with said petitioner for all rents collected from the date of the filing of the intervening petition.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

36582

RICHARD A. PICK,
Appellee,

v.

STATE MUTUAL LIFE ASSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 602

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury, plaintiff, Richard A. Pick, obtained a finding and judgment in a fourth class action in the Municipal court against the State Mutual Life Assurance Company, a corporation, defendant, for $155.70. This appeal followed.

Plaintiff alleged in his statement of claim that September 1, 1926, he entered into a contract in writing with one Everts Grenn, a general agent of defendant, which was thereafter approved in writing by defendant, the material provisions of which are as follows:

> "On all business secured by you for this Company, and placed through my agency, I hereby agree to allow you, as the premiums are paid, first year commissions and renewal commissions at the rates and numbers given in the following schedule: (Then followed a schedule indicating that plaintiff was to receive renewal premiums of 5% for nine years on the type of policy involved in this case.)
> "In no event shall said renewal commissions exceed nine in number.
> "Paid-for business within the meaning of that term shall be that business upon which at least one full year's premium shall have been paid."

It further alleged that plaintiff April 11, 1927, procured the issuance of an insurance policy upon the life of one Giorgio Polacco; that Polacco paid the first year premium and the renewal premiums, and that plaintiff was

[illegible]

[illegible] A. Jiric,
Appellee,

v.

[illegible] Insurance
Company, a corporation,
Appellant.

[illegible] Appeal from [illegible]
Court of [illegible].

No. 2 Ill. App. 2d

MR. JUSTICE [illegible] delivered
the opinion of the court.

In a trial before the court, plaintiff, Johnnie A. Jiric, obtained a judgment in a fourth class action in the municipal court against the defendant, Life Insurance Company, a corporation, [illegible]. The defendant appeals.

Plaintiff alleged in his statement of claim that November 1, 1936, he entered into a contract in writing with the Travelers Insurance, a general agent of defendant, which was thereafter approved in writing by defendant, the material provisions of which are as follows:

"In all benefits payable by you for this Company, and please insurance or company, I hereby agree to abide the on the provisions and limits your contribution the [illegible] constituents as the rules and members given in the following schedule: (Then followed a schedule indicating that plaintiff was to receive [illegible] payment of $2 for each [illegible] of his [illegible] benefits in this case.)

"In no event shall such [illegible] constituents exceed also in number.

"Hold-for benefits within the meaning of that term shall be that benefits upon which at least one full year's premium shall have been paid."

It further alleged that plaintiff, April 11, 1937, presented the insurance of an insurance policy upon the life of one Virginia Polacsek (his [illegible] wife) the first year premium and the renewal premium, but that plaintiff was

entitled to receive 5% of the renewal premiums; that on the 11th day of April, July and October, 1931, and January, 1932, defendant paid plaintiff $19.75 or a total of $79, which was 5% of the quarterly premiums of $395 each, paid by Polacco to defendant on or about the above mentioned dates; that under the provisions of the policy defendant agreed that upon the disability of Polacco, it would in addition to paying him certain benefits, waive the payment of premiums during the disability; that April 11, 1932, defendant allowed Polacco's claim for disability and waived the payment of the annual premium for 1932 amounting to $1,534; that plaintiff was entitled under the terms of his contract to a renewal commission of 5% on the premium for 1932, which was $76.70; that upon the allowance of the insured's disability claim defendant charged back and deducted from plaintiff's account the renewal commission of $79 on this policy, which had been previously paid to him for premiums that had been collected by defendant in April, July and October, 1931, and January, 1932. It was also alleged that in the business of life insurance there existed and had existed a custom or usage that, notwithstanding the waiver of renewal premiums by defendant under the terms of the policy, plaintiff under the circumstances set forth was entitled to and should be paid annual renewal commissions, it being considered for the purposes of payment of the renewal commissions that the renewal premium had been paid in full.

Defendant's affidavit of merits consisted of a denial that plaintiff was entitled to recover $115.70 or any other sum from defendant, and also a denial of the existence of any such custom or usage as was alleged in the statement of claim.

It appeared that the policy sold to Polacco by plaintiff was an ordinary life insurance policy for $25,000, which

[illegible] to number 50 of the renewal permission that on the 11th day of April, July and October, 1948, and January, 1949, defendant paid plaintiff $[illegible] on a total of $[illegible] which was 50% of the contractual premiums of $[illegible] each, and by failure to determine on or about the [illegible] actually that under the provisions of the policy extension upon which the liability of defendant is sought to rest, the payment of premiums during the disability [illegible] April 14, 1948, defendant and claimant Fo[illegible]'s claims for disability and waiver the payment of the annual premium for 1951 commencing [illegible] 1950; that plaintiff was entitled under the terms of the contract to a renewal nonforfeiture of 50% on the premium for 1950, which was [illegible] upon the existence of the insured's disability which [illegible] thereof and [illegible] the renewal nonforfeiture of 50% on the policy, which has been previously paid in the fact premiums that had been calculated by defendant in April, July and October, 1948, and January, 1949. It was also alleged that in the business of life insurance there exists and has existed a custom or usage that, constituting the waiver of renewal premiums by estoppel, waive the terms of the policy, [illegible] the circumstances and facts in evidence in and should be paid without requiring [illegible]. It being immaterial for the purposes of judgment of the trial court whether the renewal premiums had been paid or not.

Defendant's interest at trial was waiver of a minimal that plaintiff was entitled to recover either or not after the time [illegible], and also a finding of the existence of any such custom or usage as was alleged in the statement of claim.

It appeared that the policy would be renewed for plaintiff was not entitled to the benefit of the policy.

contained a provision for the payment of an extra disability premium of $176.75 a year, and that in the event of the total and permanent disability of the insured the company should pay him an income of $250 a month as long as he lived and waive all payments of future premiums.

The contract of employment was offered and received in evidence and the facts as they appeared in evidence as to the issuance of the policy to Polnecc, his claim for disability thereunder, allowance of same, and the payment of premiums by him, were substantially as alleged in the statement of claim. Defendant offered evidence to the effect that although the disability claim was allowed April 11, 1932, it was allowed as of the date of its filing; and that the benefits accruing to Polnecc were retroactive as of that date. There is, however, no evidence in the record that even tends to show the date upon which the claim for disability was filed.

Defendant states on page 5 of its brief that the premiums paid by the insured during the period intervening between the filing of his claim and its allowance, April 11, 1932, were returned to him, but a careful examination of the record fails to reveal any evidence to support that statement.

The evidence is uncontradicted that defendant received premium payments on this policy of $395 each, in April, July and October, 1931, and January, 1932, and plaintiff's right to the renewal commission of $79 on those renewal premiums is unquestioned on this record. As to the other item of $76.70 comprised in this judgment for $155.70, and representing renewal commission for the year 1932, defendant contends that under the terms of the contract with plaintiff, when it waived the payment of premiums in accordance with the terms of the policy, it was warranted in discontinuing the payment of renewal commissions to plaintiff

and that the clause in the contract "as the premiums are paid" expressly authorized it to withhold such payments.

The term "as the premiums are paid" is used in the contract, but the following language is also found there: "In no event shall said renewal commissions exceed nine in number. Paid for business within the meaning of that term, shall be such business upon which at least one full year's premium shall have been paid."

Plaintiff's theory is that a fair construction of the contract in question, reading and considering it as a whole and so construing it as to give force and effect to each of its several parts, establishes his right to payment of the 1932 renewal commissions, notwithstanding the payment of the premium was waived; that "as the premiums are paid" meant paid in any manner, and that payment of the waived premiums to the life insurance fund of defendant from a disability reserve fund created for that purpose, although only a matter of bookkeeping on the part of the company, showing a transfer on the books of the company from one reserve to another, was, in contemplation of law under the terms of the contract, such payment as bound the defendant to pay the renewal commissions on same. The contract provided for payment of renewal commissions for nine years and stated that paid up business was such business upon which at least one full year's premium had been paid. The contract did not provide specifically that the payments must be made by the insured. There is no denial in this cause that the life insurance fund of the company received payment of the 1932 premium, even though payment was waived as to Polacco. It was paid from a disability reserve fund that plaintiff had assisted in augmenting by selling this additional disability feature of the policy to the insured for an added premium. If

defendant's contention were held to be meritorious it would simply mean that plaintiff would be deprived of the fruits of his labor and effort because of his zeal in behalf of defendant.

The following excerpts from defendant's argument found on pages 12, 13 and 14 of his brief, fully accord with plaintiff's theory:

> " * * * Now then, if the premium ceases to be paid, the company must still set up a reserve based on such premium, even though it is no longer being paid in, and this the company does by setting up a special disability reserve fund out of which it draws each year and pays to its general life insurance reserve a sum sufficient to enable it to discharge its obligation to the assured. * * *
>
> " * * * And this reserve is now replenished by payments from the special disability reserve fund of the company rather than by payments from the assured. * * *
>
> " * * * No cash passes and the company merely credits the assured's reserve as though he were continuing to pay premiums, drawing funds for this purpose from still another reserve. * * *"

If plaintiff had been content to sell the insured a straight life policy no question of premium waiver could have arisen, but because of his endeavor to increase the business of defendant, and at defendant's behest, he sold a policy calling for an increased premium payment, it is urged that he should be penalized not only to the extent of the loss of renewal commissions on the additional premium for the disability feature of the policy, but that he is not even entitled to receive renewal commissions on the straight life policy, although that policy is admittedly paid up and in full force and effect. This contention cannot be reconciled with business integrity and fair dealing and we find no merit in it.

Plaintiff contends that the words "as the premiums were paid" did not, at the time the contract was made, impart the significance defendant now seeks to attach to them, inasmuch as the life insurance world considered premiums as having been paid just as fully and completely when paid out of the disability

defendant's contention were held to be particularized as would simply mean that plaintiff would be disgraced of the fruits of his labor and effort because of his small in behalf of defendant.

The following excerpts from defendant's argument first on pages 34, 35 and 36 of his brief, fully answer each plaintiff's theory:

> " " " Thus then, if the premiums cannot be paid, the employee must still rely on a theory based on such premiums, even though it is no longer being paid in, and thus the employer does by setting up a special disability reserve that at which it turns such payments and pays to the employee this disability reserve a sum sufficient to enable it to discharge its obligation to the employee. " "
>
> " " " and this theory is not contradicted by payments from the special disability reserve fund of the employer further than by payments from the reserve. " "
>
> " " " The mere payments and the employee merely benefits the reserve's reserve by transfer so that the employee's premium-paying ability for this purpose from still remains intact. " "

If plaintiff had been content to sell the insured a straight life policy no question of premium waiver would have arisen, but because of his endeavor to improve the business of defendant, and as defendant's bonus, he sold a policy calling for an increased premium payment, it is urged that he should be penalized not only in the extent of the loss of insured commissions on the additional premium for the disability feature of the policy, but that he is now expected to receive renewal commissions on the straight life policy, although that policy is absolutely paid up and in full force and effect. This contention cannot be reconciled with business integrity and fair dealing and we find no merit in it.

Plaintiff contends that the words "as the premiums were paid" did not, as the time the contract was made, impart the significance defendant now seeks to attach to them. Insurance as the life insurance world conceived premiums in having from paid just as fully and completely when paid out of the disability

reserve fund of the company after it had waived payment under the terms of the policy, as if the premiums were paid directly by the insured, and that the company necessarily anticipated such a contingency and built up a disability and waiver reserve fund out of the disability premiums received from all policy holders carrying that class of insurance, out of which fund the payment of waived premiums was in fact provided.

Plaintiff testified that there existed in the life insurance business a custom and usage whereby the insurance companies paid their agents renewal commissions on policies still in force, even though premiums were waived by the company. The existence of the custom was disputed by defendant, one of whose witnesses testified that he was familiar only with the methods of defendant, by which he was employed; and the other, also an employee of defendant, while denying the existence of the custom and usage, stated that it was the practice of nearly half of the life insurance companies to pay renewal commissions on waived premiums.

In our opinion the evidence offered as to custom and usage was not presented for the purpose of contradicting or varying the express terms of the written contract, but was offered and was admissible to explain the practice in insurance circles with reference to renewal commissions on waived premiums upon which the contract was silent.

In Greenleaf on Evidence, 16th ed., vol. 1, sec. 292, it is said:

> "It is further to be observed that the rule under consideration which forbids the admission of parol evidence to contradict or vary a written contract is not infringed by any evidence of known and established usage respecting the subject to which the contract relates * * * Proof of usage is admitted, either to ascertain the nature and extent of the contract, in the absence of express stipulations and <u>where the meaning is equivocal and obscure."</u> (Italics ours.)

In Pentefreno v. Associated Fruit Co., 318 Ill. 345, 348, it was held on page 348:

> " * * * That where no particular stipulations are made to the contrary, contracts made in the ordinary course of business are presumed to be made with reference to existing usage or custom relating to such trade, and it is always competent to resort to such usage or custom to ascertain and fix the terms of the contract."

Plaintiff insists that the contract is neither ambiguous nor uncertain if read in the light of the custom and usage that existed in the trade, that it only becomes ambiguous because of the construction defendant seeks to place upon it, and that the contract with plaintiff was executed on a printed form prepared and generally used by defendant, and should be interpreted in the light of the well settled principle of construction that if such a contract is in anywise ambiguous or uncertain, all doubts should be resolved most strongly against the party which prepared the form of contract.

It is difficult to assume that plaintiff, as agent, would undertake, or that defendant would expect him to undertake, to sell life insurance, commending as an additional and attractive feature of the policy the provisions for disability benefits and waiver of premium payments, with full knowledge on his part that the additional attractive features of the policy which he urged on his client would, in the event of disability, deprive plaintiff of renewal commissions which he would have received if that provision were not included in the policy.

Many points are raised regarding alleged errors in the admission and exclusion of evidence. We do not deem it necessary to discuss each of these points in detail. It is sufficient to state that the competent evidence in the record was ample and sufficient to sustain the finding and judgment.

In passing upon this question in Bradley v. Federal

Life Ins. Co., 178 Ill. App. 524, 533, the court said:

> "It may also be added, as to these and similar objections raised by counsel, that in cases tried by the court without a jury, the rule is that the admission of incompetent evidence will not, of itself, be held to be ground for reversal, if there is enough competent evidence in the record to sustain the findings of the court, since it will be presumed on appeal, that the court considered the competent evidence only. Knight v. Collings, 227 Ill. 348."

We are unable to agree with defendant's contention that the finding and judgment are against the manifest weight of the evidence. The trial court had an opportunity to see and hear the witnesses and we are of the opinion that substantial justice has been done in this case. The court was justified in finding that plaintiff was entitled to receive $76.70 renewal commission for 1932, as well as $79 renewal commission on the 1931 premiums paid by the insured.

Finding no reversible error in the record the judgment of the Municipal court for $155.70 is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

36603

MAE KLEINMAN, doing business as HASKELL FINANCE COMPANY,
Appellant,

vs.

HERMAN SEVERIN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

9 F

272 I.A. 602

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in the trial court, who is appellant, brought an action of replevin. There was a trial by the court without a jury and a finding and judgment that the right of property was in defendant. Motions for a new trial and in arrest of judgment were overruled and plaintiff seeks to reverse the judgment by this appeal.

The property in controversy consists of lathes, machines, tools and other appurtenances of a shop, which the affidavit for replevin alleges to be the property of plaintiff, Mae Kleinman, doing business as the Haskell Finance Company, unjustly detained by defendant, Herman Severin.

Plaintiff contends that the court erred in permitting defendant to offer on the trial the defense of usury without first having asserted it in an affidavit of merits or plea, and in refusing a continuance of the cause to plaintiff when she was taken by surprise by the evidence of defendant concerning usury.

Upon the trial the chattel mortgage upon which plaintiff relies to establish her right was identified and its execution admitted, but a careful examination of the record discloses that neither it nor the notes which it secured were offered or received in evidence. Inasmuch as this point was not raised in the trial court, we are satisfied from the record that the court and the attorneys representing the parties proceeded with the trial on the theory that after the chattel mortgage had been properly identified

and its execution admitted, it was offered and received in evidence and so considered by the court.

Assuming that the mortgage and notes were properly in evidence, there is no merit in plaintiff's contention that the defense of usury could not legally be interposed unless it had been specifically pleaded.

This same question was raised in the case of Raming v. Peiser, 259 Ill.App. 152, 154, and in disposing of it this court held:

"While the general rule is undoubtedly as contended by plaintiffs, there is a well recognized exception to it, namely, that where a plaintiff relies upon an instrument in writing for the purpose of showing his right or title, a defendant may attack the instrument on the ground that it is void for usury without specially pleading it. Jacques v. Stewart, 31 Ga. 81, 6 S E 615; Adamson v. Higgins, 45 Minn. 448, 48 N. W. 457; Davis,McDonald & Davis v. Tandy, 107 Mo. App. 437, 81 S. W. 457; Davis v. Culver, 58 Neb. 265, 78 N. W. 504; 27 Ruling Case Law, 267, sec. 70, note 12; 39 Cyc. 1041."

The uncontradicted evidence submitted tended to show that while the notes purported to represent a transaction wherein $1,000 was loaned, the actual amount loaned was $800. It was admitted that $500 was repaid on the loan. Defendant tendered $300 to plaintiff in open court which she refused to accept.

Plaintiff advances the argument on page 9 of her brief that defendant's evidence as to the amount of money received by it at the time of the loan was refuted by the evidence of the witness Sally Skolnik. Plaintiff recites that this witness testified that defendant was given $1,000 on the loan. This is a misstatement of her evidence. She testified that she was not in plaintiff's employ at the time the loan was made and that she had no personal knowledge concerning it. She did, however, testify that defendant had received only $800 at the time of the loan.

Plaintiff's argument that she was prejudiced by the refusal of the trial court to grant a continuance is untenable. She had announced herself ready for trial and the granting or refusal to grant a continuance of the cause rested in the sound distretion of the

and its execution stopped, it was altered and restored to plaintiff and no misapplication by the court.

Regarding that the testimony and briefs were strongly to wit-demon, there is no merit in plaintiff's contention that the defense of usury could not legally be interposed unless it had been specifically pleaded.

This same question was raised in the case of Smith v. Palmer, 288 Ill.App. 182, 184, and in dismissing of in this court held:

"While the general rule is undoubtedly as contended by plaintiff, there is a well recognized exception to it, namely, that where a plaintiff relies upon an instrument in writing for the purpose of showing his right or title, a defendant may adduce the instrument on the ground that it is void for usury without specially pleading it. Palmer v. Stumes, 95 Ill. 83; Bowen v. Shipley, 19 Ill. App. 447, 451; Jones v. Sawyer, 18 Ill. App. 374, 376; Bank of Rolling Green, 187, Ill. App. 74, cite in 18 Ill. App. 447."

The unauthorized evidence submitted tended to show that while the note purported to represent a transaction wherein $1,000 was loaned, the actual amount loaned was $800. It was admitted that $200 was repaid on the loan. Defendant endorsed $200 to plaintiff in open court which was refused to accept.

Plaintiff answers the argument on page 9 of her brief that defendant's evidence as to the amount of money received by it at the time of the loan was refuted by the evidence of the witness Emily Sparks. Plaintiff recites that this witness testified that defendant was given $1,000 on the loan. This is a misstatement of her evidence. She testified that she was not in plaintiff's employ at the time the loan was made and that she had no personal knowledge respecting it. The fact, however, remains that defendant had received only $800 at the time of the loan.

Plaintiff's argument that she was prejudiced by the refusal of the trial court to grant a continuance is untenable. She had unnecessary ample time for trial and the granting or refusal to grant a continuance of the cause rested in the sound discretion of the

trial court. We do not feel that there was any abuse of that discretion under all the circumstances of the case.

Finding no error in the judgment of the trial court, it is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

36923

ADOLPH GOELITZ, Sr.,
Appellee,

v.

BENJAMIN L. LATHROP,
ADOLPH A. HENKEL,
GEORGE J. KIRKGASSER and
HARRY A. BEST,
Defendants.

BENJAMIN L. LATHROP,
Appellant.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

272 I.A. 603

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

The appellant, Benjamin L. Lathrop, prosecutes this interlocutory appeal from an order of the Circuit court granting a temporary injunction restraining Lathrop (one of the defendants below and hereinafter referred to as defendant) from enforcing or collecting, or attempting to enforce or collect, a judgment secured by him in the Circuit court, February 15, 1933, against Adolph Goelitz, Sr., complainant, (and also against Adolph Henkel) for $9450.

April 7, 1933, complainant filed his bill in the Circuit court, the essential allegations of which are that October 19, 1931, Benjamin L. Lathrop brought an action at law in the Circuit court of Cook county against Henkel Edge-Lite Corporation (hereinafter referred to as the corporation), Adolph A. Henkel, George J. Kirkgasser, Harry A. Best and Adolph Goelitz, Sr., who were all served with process and appeared; that Lathrop filed his declaration and that issue was joined by the filing by all of the defendants of pleas of the general issue and several special pleas; that

February 15, 1933, in a trial by the court without a jury, judgment was entered in favor of Lathrop and against complainant and Henkel for $9450 including $1200, attorney's fees; and that the cause was dismissed on the trial as to defendants Kirkgasser and Best, having been previously dismissed as to the corporation.

The bill also alleged that the cause was tried February 14 and February 15, 1933; that complainant was not present during the trial nor represented by an attorney, and had no knowledge that the trial was to take place or had taken place until after the expiration of the January term, three days before the end of which judgment was entered; that Lathrop, Kirkgasser and Best were present at the trial and represented by counsel and Henkel was neither present in person nor by counsel; and that complainant is informed and believes and is advised by counsel that the proofs upon said trial did not tend to support any cause of action against him and were insufficient in law to support the judgment; that the judgment was contrary to the law and the evidence and would be reversed and a new trial granted in the event of review of the same provided a bill of exceptions was available, which said bill of exceptions cannot, except with the aid of this court, be made to appear of record in this case.

The bill further alleged that Lathrop's attorney stated on the trial that the cause of action arose out of a violation of the Illinois Securities law; that Lathrop purchased seventy five shares of preferred and one hundred and fifty shares of common stock of the corporation and that the individual defendants were sued as officers or directors; that plaintiff's theory was that the corporation had no authority to sell the stock and was insolvent at the time the same was sold to Lathrop; that Lathrop tendered to defendants the stock certificates; and that the only evidence pro-

February 15, 1922, on a trial by the court without a jury, judgment was entered in favor of Lathrop and against complainants and Bondy for $3000 including $1500, attorney's fees, and that the cause was dismissed on the trial as to defendants Kingsbury and Hart, having been previously dismissed as to the corporation.

The bill also alleged that the cause was tried February 14 and February 15, 1922; that complainants had not proven during the trial nor represented by an attorney, and had no knowledge that the trial was to take place at that time; that until the explanation of the Chancery court, their duty before the end of which judgment had occurred that defendants Kingsbury and Hart were present at the trial and represented by counsel and Bondy was neither present in person nor by counsel and that complainants informed and believed and is advised by counsel that the proofs upon such trial did not tend to support any claim of action against him and were insufficient as law to warrant the judgment; that the judgment was contrary to the law and the evidence and would be reversed and a new trial granted in the event of review of the same; that a bill or exceptions was available, which said bill of exceptions showed, except with the aid of this court, he must be unable to appear or present in this case.

The bill further alleged that Lathrop's attorney stated on the trial that the cause of action arose out of a violation of the Illinois Securities Law; that Lathrop procured security from shares of preferred and one hundred and fifty shares of common stock of the corporation and that the individual defendants were mere as officers or directors; that plaintiff's theory was that the corporation had no authority to sell the stock and was involved at the time the case was held to Lathrop; that Lathrop knowing to refrain the stock worthlessness and that the only evidence pro-

duced at the trial was that offered by plaintiff.

The bill also alleged that Lathrop testified that in January, 1931, Henkel suggested that Lathrop put some money into the corporation; that in February, 1931, Henkel said that $8250 would be the price of seventy five shares of preferred and one hundred and fifty shares of common stock, and that if Lathrop put that amount in Henkel would give him a ninety day note signed by the corporation and indorsed by Henkel and some of the officers; that if he wanted his money at the end of ninety days he could have it; that Lathrop told Henkel he would put in $8250; that February 15, 1931, Lathrop paid Henkel $2500 and Henkel gave him a ninety day note for that amount signed by the corporation and indorsed by Henkel and Kirkgasser; that February 27, 1931, Lathrop paid $5750 to Henkel and received a note for that amount executed by the corporation and the stock certificates in question executed by Henkel, as president, and George J. Kirkgasser, as secretary; that April 9, 1931, Lathrop attended a stockholders' meeting of the corporation at which time complainant was elected a director of the corporation; that complainant was a stockholder and director of the corporation; that May 25, 1931, Lathrop told Henkel that he desired to return the stock and have his money refunded; that he repeated his demand on other occasions and that finally October 8, 1931, accompanied by his attorney, he renewed the demand which Henkel refused to comply with; and that Henkel was the president and manager of the corporation.

The bill further charges that the only evidence offered on the trial of the lawsuit concerning complainant was the testimony of Lathrop that April 9, 1931, complainant attended a meeting of the stockholders of the corporation and at that meeting was elected a director of the corporation and that complainant was a stockholder and director of the corporation; and that there was no evidence

dismissed as the trial was then affected by plaintiff's.

The trial also alleged that Lathrop testified that on January, 1922, Hunkel suggested that Lathrop get some money from the corporations that on February, 1922, Hunkel said that there would be the price of seventy five shares of preferred and one hundred and fifty shares of common stock, and that if Lathrop got that amount to Hunkel would give him a ninety day note signed by the corporations and indorsed by Hunkel and some of the officers; that if he wanted his money at the end of ninety days he could have it; that Lathrop told Hunkel he might get in trouble; that February 12, 1922, Lathrop paid Hunkel $2000 and Hunkel gave him a ninety day note for that amount signed by the corporations and indorsed by Hunkel and testimony that February 27, 1922, Lathrop paid $2000 to Hunkel and received a note for that amount signed by the corporations and for which possibility he received assurance by Hunkel, on presentment, and that on A. Blackmarr, he testified that April 8, 1922, Lathrop attended a stockholders' meeting of the corporations at which time complainant was elected a director of the corporations; that complainant was a stockholder and director of the corporations; that May 28, 1922, Lathrop told Hunkel that he desired to release the stock and have his money returned; that he repeated his demand on other occasions and that finally October 9, 1922, accompanied by his attorney, he removed the demand which Hunkel refused to comply with; and that Hunkel was the president and manager of the corporations.

The bill further charges that the only evidence offered on the trial of the lawsuit commenced against the defendant at Lathrop that April 9, 1923, complainant attended a meeting of the stockholders of the corporations and at that meeting was elected a director of the corporations and that complainant was a stockholder and director of the corporations; and that there was no evidence

on the trial to connect complainant with the sale of the stock to Lathrop.

The bill further alleged that complainant always had a meritorious defense to Lathrop's claim and is not now and never was legally liable to him; that complainant never sold nor offered to sell any shares of stock of the corporation, never knowingly performed any act or in any way furthered the sale of any stock or securities of the corporation to Lathrop and never aided or assisted in the sale of the stock to him; that he never knew or heard of any offer of sale or sale to Lathrop until thirty days after the common law action was commenced in the Circuit court and never knew prior to November, 1931, that the corporation was insolvent, and never made any sale of any securities of the corporation to anyone.

The bill further asserts that complainant was sorely afflicted physically and mentally for a period of three years, including the date of the institution of the lawsuit by Lathrop in the Circuit court, and that he first learned of the suit from Henkel three days after service of summons on Henkel October 19, 1931; that complainant, October 22, 1931, partly because of his ill health, partly because he knew nothing of the facts of the case, and partly because the lawsuit was primarily a matter of the business of the corporation, made inquiry of Henkel who was president of the corporation concerning the case; that Henkel advised complainant that he would engage a lawyer to represent the corporation and that he would arrange to have the same lawyer appear and represent complainant without charge or expense to him, in which arrangement complainant acquiesced, and December 5, 1931, at Deerfield, Illinois, Henkel advised complainant that he had employed Becker and Golden as attorneys in the case; that Becker and Golden entered complainant's appearance and their own appearance

on the right to express complaints with the sale of the goods to Lathrop.

The bill further alleged that complainant always had a meritorious defense to Lathrop's claim and is not now and never was legally liable to the said complainant, nor did he offered to sell any shares of stock of the corporation, never knowingly purchased nor did he in any way furthered the sale of any stock or securities of the corporation to Lathrop, and never did so realize in the sale of the stock to him that he never knew or heard of any offer of sale or sale to Lathrop until thirty days after the common law action was commenced in the Circuit Court, and never had prior to October, 1933, that the corporation was insolvent, and never made any sale of any securities of the corporation to anyone.

The bill further avers that complainant was totally afflicted physically and mentally for a period of three years, including the date of the institution of the lawsuit by Lathrop in the Illinois court, and that he first learned of the suit from Jerry three days after service of summons on Jerry October 19, 1933 (his complaint, October 28, 1933, partly because of his ill health, partly because he knew nothing of the facts of the case, and partly because his lawyer was primarily a writer of the business of the corporation, made inquiry of Jerry, who was president of the corporation concerning the event that Jerry's civil complainant that he would require a lawyer in prosecuting the corporation and that he would arrange to have his own lawyer appear and represent complainant without charge or expense to him, in which arrangement complainant acquiesced, and in October 5, 1933, in Deerfield, Illinois, Jerry's civil complainant that he had employed Judge and Defendant be attorneys in the trial that Jerry had not taken larger complainant's expenses and their and expenses

as attorneys for him December 9, 1931, and January 8, 1932, filed certain pleas on his behalf; that December 28, 1932, at Deerfield, Illinois, Lathrop advised complainant that he was employing Leo G. Mana, an attorney at law of great liability as a trial lawyer, and that Mana would be substituted in the case for Decker and Golden, to which complainant agreed; and that Mana entered his appearance for complainant and the other defendants on that date.

The bill further alleged that January 17, 1933, at Chicago, attorney Mana placed in a United States mail box, a sealed envelope addressed to complainant at Deerfield, Illinois, bearing an uncancelled United States three cent postage stamp and containing a copy of a notice that Mana would move the court January 19, 1933, for leave to withdraw as attorney for the defendants; and that January 19, 1933, pursuant to such notice and by leave of court, Mana, unknown to complainant, withdrew as attorney for the defendants.

The bill further alleged that neither the envelope mailed to complainant, nor the notice, nor any copy or original of the notice ever reached complainant, or, as far as he knows, ever reached his home in Deerfield, Illinois; that complainant did not learn or hear of or see any copy of said notice until three days after February 18, 1933, when the January term had expired; that complainant did not learn nor hear from any source of any intention or motion of Mana to withdraw or of any proceeding in the case concerning his withdrawal or his withdrawal until three days after February 18, 1933, and until that date the complainant knew nothing of the trial nor of the entry of judgment against him in that cause; that three days after February 18, 1933, at Deerfield, Illinois, complainant was served by the sheriff of Lake county, Illinois, with a copy of an execution based on the judgment entered in that

as attorneys for the Defendant, Inc., and January 6, 1972, filed written Plea on his behalf that December 12, 1971, at Deerfield, Illinois, Lawrence Wayne complained to the said Leo G. Hess, an attorney at law of great identity in a total lawyer, and that Hess could be available to the case for Jerome and Calvin, in which complaint, against, and that Hess claimed his appearance for complainant and the other defendants on that date.

The Will County alleged that January 24, 1972, at Deerfield, Illinois, Hess filed in a Joint Plain suit ban, a racial envelope addressed to complainant at Deerfield, Illinois, having on successive Wright Tribune that great photos among and containing a copy of a notice that Hess would move the court January 28, 1972, for leave to withdraw as attorney for the defendant and that January 19, 1972, pursuant to such notice and by leave of court, Hess, withdrew as complainant, withdrew as attorney for the defendants.

The Will County alleged that within the envelope mailed to complainant, and the notice, was copy of a letter of the notice over another complainant, as, as far as he knew, over another Mr. Hess in Deerfield, Illinois; that complainant did not learn or hear of or see any copy of such notice until three days after February 16, 1972, when the January term had expired; that complainant did not learn nor hear from any source of any intention or motion of Hess to withdraw or of any proceeding in the case concerning his withdrawal or his withdrawal until three days after February 16, 1972, and until that time the complainant knew nothing of the trial nor of the entry of judgment against him in that amount; that three days after February 16, 1972, at Deerfield, Illinois, complainant was served by the sheriff of Lake County, Illinois, with a copy of an execution issued on the judgment entered in that

lawsuit; and that February 24, 1933, complainant employed an attorney from whom he received in subsequent conferences accurate information and advice concerning the notice of the motion to withdraw forwarded to him through the United States mail by his attorney Mana, Mana's withdrawal from the case, the trial, and the judgment entered against him.

The bill of complaint was verified by complainant and attached to the bill was a verified certificate of his solicitor, Lloyd C. Whitman, in the following form:

"To whom it may Concern:

"I, the undersigned Lloyd C. Whitman, hereby certify that I am a member of the bar of Illinois, have been engaged in active practice of the law in Illinois for over thirty years, and as attorney at law for Adolph Goelitz, Sr. and for him and on his behalf, I prepared the foregoing bill of complaint; that in so preparing said bill of complaint I had before me a typewritten transcript entitled in said cause number B-230276 prepared by a court reporter, E. M. Franklin, and an affidavit thereto, dated March 28, 1933, by said E. M. Franklin that she, said E. M. Franklin, has been engaged in the business of court reporting for more than ten years, that she reported the testimony and proceedings at the trial of said case number B-230276 to the best of her skill and ability, and caused her report of the same to be transcribed and that said transcript, as she verily believes, is a true and correct transcript, of all the testimony offered and proceeding had on said trial. And I further certify that to the best of my information and belief, and in my best judgment as an attorney at law, said bill of complaint correctly and truthfully states and presents all material evidence offered or received, and proceedings had at said trial of said case number B-230276, and that the allegations in that respect of the paragraph of the foregoing bill of complaint numbered 4 to 12, both inclusive are true.

"Lloyd C. Whitman,
"Attorney at Law."

(Case No. B-230276 was the common law action referred to in the bill of complaint.)

Appended to the bill and identified as Exhibit "A" was a transcript of the record of the common law action, including the declaration and two additional counts, charging substantially that Henkel, Kirkgasser, Best and complainant sold stock of the corporation to Lathrop in violation of the Blue Sky Law.

Complainant's theory is that he exercised due diligence

in retaining the services of attorneys who filed the necessary pleas in his behalf and diligently represented his interests in the lawsuit until January 19, 1933, when an order was entered by the court permitting attorney Hana, who represented complainant at that time, to withdraw as his attorney upon his motion and presentation of his affidavit showing service of notice of his motion for leave to withdraw as his attorney by forwarding same through the United States mail to complainant's address January 17, 1933; that, through some unavoidable, accidental miscarriage of the United State mail, the notice never reached complainant, or to his knowledge his home, and that when the cause was tried February 14 and February 15, 1933, and judgment entered February 15, 1933, he was neither present in person nor by counsel; that no evidence was presented on that trial showing that he was either an officer or director of the corporation at the time of the sale of the stock to defendant in this proceeding, and that there was not a scintilla of evidence offered connecting him with the sale of the stock, or to show that he performed any act or in any way furthered such sale; that, having received no notice of the withdrawal of his attorney, he continued to rely on him to properly protect his interests in that action; that no preparation was necessary for his defense of the lawsuit, inasmuch as no liability on his part could have been shown, and none was in fact shown on the trial of the case; that he knew nothing of the trial and judgment against him until three days after the January, 1933, term of the Circuit court had expired, when an execution was served on him by the sheriff of Lake county at his home in Deerfield, Illinois; that the judgment was secured against him, not because of any lack of diligence on his part, but solely by reason of the accidental miscarriage of the United States mail; and that complainant did not and does not intend

in retaining the services of attorneys who felt the necessity
given in his behalf and diligently represented his interests in
the Superior Court in 1919, then on error the reversal of
the more punishing criminal code, the prosecutor insisted
at that time, to withdraw as his attorney upon his motion and
presentation of his affidavit showing service of notice of his
motion for leave to withdraw as his attorney by depositing same
through the United States Mail in Wrightsville, Georgia, January
17, 1921 that, through some inadvertence, accidental circumstance
of the United State Mail, the notice never reached complainant,
or to his knowledge his home, and that when the cause was tried
February 21 and February 28, 1921, and judgment entered against
him, he was neither present in person nor by counsel thus no
evidence was presented on this trial showing that he was either an
accessory or director of the commission of the crime of the wife of
the plaintiff in error in this proceeding, and that there was not
a modicum of evidence offered connecting him with the sale of the
drugs, or to show that he participated any act or in any way involved
such sale. That, having received no notice of the withdrawal of
his attorney, he continued to rely on him to properly protect his
interests in that instance that no prejudice was necessary for his
return of the lunatic, inasmuch as he liability on his part would
have been shown, and none was in fact shown on the trial of the
case; that he knew nothing of the trial and judgment against him
until three days after the January, 1922, term of the Circuit court
had adjourned, when no execution was served on him by the sheriff of
Lake County at his home in Deerfield, Illinois; that the judgment
was secured against him, not because of any lack of diligence on
his part, but solely by reason of the accidental misadventure of the
United States mail; and that complainant did not and does not intend

to ask the trial court to set aside the judgment in order to permit him to present a defense in the common law action, but satisfied that no case was proven against him insists that in equity and good conscience the chancellor was justified in enjoining the enforcement of the judgment, unless and until defendant below enters into the necessary stipulation in the law court to give complainant a bill of exceptions, of which he has been accidentally deprived, so that he may have what appears to him to be an unconscionable judgment reviewed by this court on writ of error.

No answer was filed to the bill of complaint and the chancellor properly found that, for the purpose of the motion for a temporary injunction restraining enforcement of the judgment and the order granting same, the allegations of the bill of complaint were true.

Defendant contends first that the bill of complaint presents no meritorious defense to the common law action and therefore the order for a temporary injunction should not have been entered. Lathrop insists now that complainant was a director of the corporation at the time the stock was sold to him and was liable to him under the Blue Sky law through the mere fact that he was a director, even though the evidence offered on the trial did not even remotely suggest that complainant sold the stock in question to him or that he had met or even seen Lathrop prior to the sale, or that he had knowingly or otherwise performed any act or in any way furthered such sale.

We have carefully examined the cases cited by counsel and neither did any of them, nor any other case in this state that we have been able to find upon diligent inquiry, hold that a director of a corporation, the stock of which has been sold in violation of

It was the intent merely to use under the judgment in error to permit him to pursue a defense in the common law action, but indicated that he once was proven guilty under the instrument that in equity and good conscience the chancellor was justified in enjoining the enforcement of the judgment, which was until overturned based upon the monetary adjudication in the law court to give complainant a writ of mandamus, if that he has been successfully carried, or that he may have had a temporary injunction in the law court be an unconscionable judgment rendered by this court we will of course.

No answer was filed to the bill of complaint and the chancellor properly issued that, for the purpose of the action for a temporary injunction restraining enforcement of the judgment and the motion properly made, the allegations of the bill of complaint were true.

Defendant contends first that the bill of complaint presents no meritorious defense to the common law action and therefore the order for a temporary injunction should not have been entered. Initially insists now that complainant was a director of the corporation at the time the check was sold to him and was liable to him under the Ohio law for the more fact that he was a director, even though the evidence offered on the trial did not even remotely suggest that complainant sold the stock in question to him or that he had met or even been introduced prior to the sale, or that he had knowingly or otherwise performed any act or in any way participated.

We have carefully examined the cases cited by counsel and neither did any of them, nor any other case in ohio state that we have been able to find upon diligent inquiry, hold that a director of a corporation, the stock of which has been sold in violation of

the Blue Sky Law, was liable under that law simply by reason of the fact that he was a director, when he neither sold the stock nor aided or encouraged the sale, nor knowingly performed any act or in any way furthered such sale.

But the bill of complaint alleged, and for the purpose of this appeal we must consider the allegations to be true, that Lathrop's evidence on the trial of the lawsuit was that complainant was present at a meeting of the stockholders of the corporation, April 9, 1931, which was several months after the sale of the stock, and at that time was elected a director of the corporation. Nothing appears in the record presented to this court to indicate that complainant was a director of the corporation prior to the date of that meeting. If it is true, as the record indicates, that complainant was not a director of the corporation at the time of the sale of the stock and that he did not sell the stock, nor knowingly perform any act or in any way further such sale, we must conclude that the bill of complaint does present a meritorious defense to the action at law and that there is no merit to defendant's first contention.

Defendant's second contention is that matters in issue are res adjudicata against complainant. All three counts of the declaration in the common law action allege that complainant sold Lathrop the stock in question and each count alleged that at all times mentioned therein complainant and the other individual defendants were officers or directors of the corporation. These allegations were put in issue by the plea of the general issue to the several counts, which set up in complainant's behalf the defense that he had no knowledge of and was not a party to the sale of the stock. It was unnecessary that complainant plead as a defense to that action that he was not liable merely because he was a director of the corporation because no such claim was

the time by law, the liable under that law simply by reason of the fact that he was a director, upon he neither made the slack nor aided or encouraged the acts, nor knowingly participated in or in any way furthered such acts.

But the bill of complaint alleged, and for the purpose of this appeal we must consider the allegations to be true, that Lathrop's evidence on the trial of the Journal was that conspiracy was present at a meeting of the stockholders of the corporation, April 4, 1901, which was several months after the acts of the slack, and at that time was elected a director of the corporation. Nothing appears in the record presented to this court to indicate that complainant was a director of the corporation prior to the date of that meeting. If it is true, as the record indicates, that complainant was not a director of the corporation at the time of the acts of the slack and that he did not call the slack, nor knowingly participate in it or in any way further such acts, we must conclude that the bill of complaint does present a meritorious defense to the action at law and that there is no doubt in Chancery's first assumption.

Defendant's second contention is that matters in issue are res adjudicata against complainant. It appears upon the of the decisions in the common law action allege that complainant said Lathrop the stock in question and such owner alleged that at all times mentioned therein complainant and the other individual defendants were officers or directors of the corporation. These allegations were put in issue by the plea of the general issue in the several counts, which set up in complainant's behalf the defense that he had no knowledge of and was not a party to the acts of the slack. It was unnecessary that complainant plead as a defense to that action that he was not liable merely because he was a director of the corporation because no such claim was

asserted in Lathrop's declaration. Defendants Kirkgasser and Best were directors of the corporation at the time of the sale of the stock. Kirkgasser was secretary of the corporation and the record discloses that he had actually taken part in the sale of the securities to Lathrop, but the issues were found in favor of these defendants who were present at the trial and represented by counsel, and against the complainant. The record does not disclose the theory upon which the trial court decided the case and we find it difficult to understand why a judgment could possibly have been entered against complainant and not the other defendants, especially against Kirkgasser who was both a director and secretary of the corporation, and was shown by the evidence to have actually taken part in the sale of the stock and the issuance of the stock certificates.

No complaint is made by complainant because of the withdrawal of attorney Hana or that he did not have an attorney present at the trial to present his defense for him and protect his interest, but he asserts that his defenses were adequately presented by Lathrop; that the proofs failed to show any liability on his part and his only complaint at this time is that he was accidentally deprived of a bill of exceptions necessary to enable him to secure an adequate review of the judgment on writ of error, because of his failure to receive attorney Hana's notice of withdrawal. In our opinion the judgment of the trial court is not <u>res judicata</u> upon due writ of error from a reviewing court.

Defendant next contends that complainant is precluded from seeking equitable relief because he was guilty of gross negligence in the common law suit. Many cases have been cited by defendant in support of this contention, but they are readily distinguishable from the case at bar. They expound the general

asserted in Anthony's behalf. Defendants Ellingham and Bent were jointly of the conspiration in the name of the sale of the stock. Ellingham was constantly of the conspiration and the record discloses that he had actually taken part in the sale of the securities to Lathrop, but the losses were found in favor of these defendants who were present at the trial and represented by counsel, and against the complainant. The trial judge had dismissed the theory upon which the trial court dismissed the case and we find it difficult to understand why a judgment could possibly have been entered against complainant and not the other defendants, especially without disagreement when we hold a director and secretary of the corporation, and was shown by the evidence to have actually taken part in the sale of the shares and the issuance of the stock certificates.

Mr Anderson is sure by complainant's counsel at the close of trial of attorney Lamm or that he did not have an attorney present at the trial to present his defense for him and protect his interests, but he admits that his defenses were adequately presented by Lathrop that the proofs failed to show any liability on his part and his only complaint at this time is that he was substantially deprived of a bill of exceptions necessary to enable him to secure an adequate review of the judgment on writ of error, because of his failure to receive attorney Lamm's notice of dismissal. In our opinion the judgment of the trial court is not the judgment upon the writ of error from a revisiting court.

Defendant Bent asserts that complainant is precluded from maintaining relief because he was guilty of gross negligence in the common law suit. Many cases have been cited by defendant in support of this contention, but they are readily distinguishable from the case at bar. They emphasize the personal

doctrine that a party seeking to enjoin the enforcement of a judgment must be free from all negligence and must use the highest degree of diligence. That doctrine is the law of this state, but we are unable to discover negligence in this case on the part of complainant that brings him within that rule. He was properly represented by counsel and his interests in the lawsuit diligently cared for until his last attorney, Mr. Hana, mailed him notice of his intention to withdraw as his attorney.

No negligence can be charged to attorney Hana, complainant's last attorney in the lawsuit, inasmuch as he used one of the methods prescribed in the rules of the Circuit court for the service of notice. Complainant cannot be charged with negligence because of the failure of the notice to reach its destination. It is true that the law indulges the presumption from the fact of mailing that the notice was received, but that presumption is overcome by the fact established by the record in this case that the notice was not received. The record disclosed no negligence on the part of any of his attorneys or himself or on the part of any codefendant, or agent, that might be imputable to complainant that was the proximate cause of the effect from which relief is sought. It must be conceded that complainant could be charged with no negligence up to the time that attorney Hana mailed him the withdrawal notice, and his failure to receive the notice having been alleged in his bill and being an admitted fact on the record, he had the right to assume that Hana continued as his attorney and to rely on him to protect his interests in the common law action.

We have carefully considered the argument of defendant in support of his contention that complainant was guilty of such negligence as precluded him from seeking equitable relief and find that it is without merit. In our opinion complainant was

doctrine that a party seeking to sustain the contravention of a
judgment must be free from all negligence and must use the highest
degree of diligence. That decision is the law of this state, but
we are unable to discover negligence in this case on the part of
complainant that brings him within that rule. He was promptly
informed by counsel and his interests in the Lassie Mining Co.
would for until his last attorney, Mr. Dunn, notice of
his intention to withdraw as his attorney.

No negligence can be charged to attorney Dunn, complain-
ant's last attorney in the Lassie, inasmuch as he used one of the
methods prescribed in the rules of the District court for the ser-
vice of notice. Complainant cannot be charged with negligence
because of the failure of the notice to reach the destination. It
is true that the law imposes the presumption from the fact of
mailing that the notice was received, but that presumption is over-
come by the fact established by the record in this case that the
notice was not received. The record discloses no negligence on
the part of any of his attorneys or himself or on the part of any
intermediate, or agent, that might be imputable to complainant that
was the proximate cause of the effect from which relief is sought.
It may be assumed that negligence could be charged with so neg-
ligence up to the time that attorney Dunn mailed him the withdrawal
notice, and his failure to receive the notice having been alleged
in his bill and being an admitted fact on the record, he had the
right to assume that Dunn continued as his attorney and to rely on
him to protect his interests in the common law action.

We have carefully considered the argument of defendant
in support of his contention that complainant was guilty of such
negligence as precluded him from seeking equitable relief and
find that it is without merit. In our opinion complainant was

deprived of his legal rights in this case and particularly his right to a bill of exceptions, that being the right he seeks to assert in this proceeding, solely through the accidental miscarriage of the United States mail in its failure to deliver to him attorney Hana's notice of his motion for leave to withdraw as his attorney.

In defining the character of accident that will justify invoking equitable relief against a resulting judgment Freeman on Judgments, 5th ed., vol. 3, sec. 1247, p. 2600, used the following language, quoting Pomeroy's Equity Jurisprudence:

"An unforeseen and unexpected event occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal rights, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain."

It is the settled law of this state that equity will grant relief against the effects of a judgment resulting from accident where the complaining party and his attorney are free from negligence. In West Chicago St. R. R. v. Stoltzenfeldt, 100 Ill. App. 142, 145-6, the court held:

"It is contended by the learned counsel for appellant that a court of chancery has no jurisdiction here to grant a new trial in an action at law, and therefore that the decree is here erroneous. In this behalf the decision of this court in Mechanics N. Bank v. Colehour, 44 Ill. App. 470, is cited and relied upon. The decision is not controlling of this case. It goes only to the extent of holding that a court of chancery has not in general, jurisdiction to direct a court of law what it shall do. But it does not hold that a court of chancery may not enjoin a party to a suit at law, or to a judgment at law, from enforcing it, and thus, by operating upon the person in restraint of action, control the effect of the suit or judgment. This is in effect what the court below undertook to do here, i.e., to restrain appellant from enforcing the judgment against appellee as a bar to her further maintenance of her suit. To this extent a court of chancery under our practice has undoubted jurisdiction. Wilday v. McConnell, 63 Ill. 278; Foote v. Despain, 87 Ill. 23; Liesegewitz v. W. C. Ry. Co., 80 Ill. App. 243; P. N. Ins. Co. v. Chichocky, 94 Ill. App. 168.

"And these decisions are supported by authority elsewhere. 2 Beach Mod. Eq. Jur., Sec. 658; 1 Black on Judgments, Sec. 356 et seq.; Freeman on Judgments (2d Ed.), Sec. 486.

deprived of his legal rights in this case was particularly his right to a fair of exception, that being the right he seeks to assert in this proceeding, namely through the constitutional mandate of the United States that in the failure to deliver to him attorney Hunt's notice of his motion for leave to withdraw as his attorney.

In finding the character of conflicts that will justify granting withdrawal, United v. Gonzalez, 3d Cir. 1967, p. 800, said the following:

"The interests and responsibilities of counsel and client are the party affected by it, and if which this case cannot be not the proceeding ceases, similarly, neither is his own interests and wish, to have some legal rights, or because obligations to some based liability, and counsel cannot neither a conscientiously legal right, which is only as a violation of good conscience for the client interest, about the circumstances, to proceed."

It is the settled law of this state that counsel will grant relief against the effects of a judgment resulting from mistake, where the complaining party and his attorney are free from negligence. In Jack Dakota 18, v. Dakotaville, 2d Cir. 1967, 147-d, the court held:

"It is recognized by the Internal Revenue for expectant that a right of discovery has an jurisdiction duty to grant a new trial in an action at law, and therefore that the course is here erroneous. In this behalf the decision of this court in Gonzalez v. Pure v. Delaware, 4d Cir. 1967, is cited and relied upon. The relation is not controlling of this case. It does only in the matter of holding that a motion of discovery has not be granted. Jurisdiction to direct a motion of discovery may shall do. But it does not hold that a motion of discovery may not relate a party to a suit at law, or to a judgment at law. Some relating it, and then, by controlling upon the parties in interest or action, control the effect of the suit at judgment. This is the effect that the court below undertook to do here. In relation equitable from interfere the judgment against counsel as a bar to her further maintenance of her suit. In this grant a motion of discovery under her provides her substantial rights. Under v. Dakotaville, 2d Cir. 1967, 147-d, 147 Dakotaville v. Dakotaville, 2d Cir. 1967, 147-d, 147 Dakotaville v. Dakotaville, 2d Cir. 1967, 147.

"The these decisions are supported by authority elsewhere. 2 Cook on Ct. Jur., sec. 2, 2d ed. 2 Dakotaville Ins. Co. v. Dakotaville Ins. Co., 2d Cir. 1967.

"The ground upon which such relief can be granted is, however, in our practice, at least, limited to cases wherein the judgment at law has been obtained through fraud, accident or mistake.

"In Foote v. Despain, supra, our Supreme Court say:

"'We understand the rule to be well settled that when a judgment has been obtained by fraud, accident or mistake, courts of equity have jurisdiction to grant a new trial at law, or otherwise relieve against the judgment, unless the party against whom the judgment has been rendered is guilty of negligence. * * * When a judgment has been obtained by fraud, accident or mistake, and the complaining party is free from negligence, it is proper the relief should be granted in a court of equity.'

"There can be no question as to equity jurisdiction if fraud, accident or mistake is shown in the obtaining of the judgment, and it is also shown that the complaining party and his attorney have been free from negligence."

To defendant's contention that equity is slow to vitiate judgments the answer is that complainant disclaims any intention of seeking the vacation of the judgment in question, except as it may be set aside on writ of error by a court of review upon the presentation of a proper bill of exceptions.

There is no force in defendant's contention that complainant had an adequate remedy at law. The cases cited have no application to the instant case and neither the writ of error coram nobis nor the statutory substitute motion would be effective in securing the relief sought in this proceeding; and even though they were that fact would not be a bar to relief in equity.

Complainant does not make any point on any ruling of the trial court in the law case, except as to the sufficiency of the evidence there presented to support the judgment entered. The case was tried by the court without a jury and no motion for a new trial was necessary or required to preserve the question of the sufficiency of the evidence to support the finding and judgment. Climax Bag Co. v. American Packing Co., 234 Ill. 179, 182. Since the amendment to the Practice act in 1911 an exception to the entry of the judgment is no longer required to enable the reviewing court to pass upon the sufficiency of the evidence to

support a judgment. Auto Truck Steel Body Co. v. Chicago R. & I. Co., 218 Ill. App. 230, 245; City of Lexington v. Harrington, 281 Ill. 461, 466.

The judgment was entered February 18, 1933, just three days before the expiration of the January term, and the first information concerning same reached complainant three days after the expiration of the January term when even the trial court was powerless in the absence of a stipulation from Lathrop to certify a bill of exceptions. Other points have been urged, but we deem it unnecessary to discuss them as they do not affect the merits of this appeal.

For the reasons stated it is our opinion that the chancellor was justified in granting the temporary injunction and the order of the Circuit court restraining the enforcement of the judgment is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

support a judgment. [illegible] v. [illegible] 2 R. L. [illegible] 111, [illegible] 1921 [illegible] of Antrim v. [illegible] 221, 223, 224.

The judgment was entered January 15, 1921, just three days before the expiration of the January term, and the first substantive amendment made studies [illegible] the expiration of the January term when the trial court was powerless in the absence of a stipulation from defendant to modify a bill of exceptions. Other points have been urged, but we deem it unnecessary to discuss them as they do not affect the merits of this appeal.

For the reasons stated in the opinion that the judgment was justified in granting the injunction and the order of the district court reversing the determination of the judgment is affirmed.

AFFIRMED.

Stacy and Hamilton, JJ., dissent.

36276

MARY ELLEN LEONARD,
Appellant,

v.

REALTY & COMMERCIAL FINANCE CO., Inc., a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

272 I.A. 603

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced August 18, 1931, there was a trial before a jury in June, 1932, and at the close of plaintiff's evidence the court directed the jury to return a verdict in defendant's favor. Upon such verdict being returned, and after plaintiff's motions for judgment non obstante veredicto, for a new trial and in arrest of judgment had severally been overruled, the court entered the judgment against plaintiff for costs from which she prosecutes the present appeal.

Plaintiff's declaration consists of a special count and the common counts, accompanied by an affidavit of claim stating inter alia that there is due to her from defendant the sum of $3,316.55. Defendant filed a demurrer to the special count and a plea of the general issue as to the common counts, accompanied by an affidavit of merits. On April 9, 1932, after argument, the court sustained the demurrer to the special count (to which ruling plaintiff objected) and set the cause for trial at a future day on the issues made by the common counts and plea. One of the errors assigned by plaintiff is that the court erred in sustaining the demurrer. Shortly before the trial defendant filed an amended affidavit of merits. In the special count the allegations are in substance:

In an action in assumpsit, commenced August 19, 1883, there was a trial before a jury in June, 1884, and at the close of plaintiff's evidence the court directed the jury to return a verdict in defendant's favor. Upon such verdict being returned, and after plaintiff's motion for judgment n.o.v. was overruled, he sued out a writ of judgment for nonsuit, which the court refused, the court entered the judgment complained of, from which he prosecutes the present appeal.

Plaintiff's declaration consists of a special count and the common counts, accompanied by an affidavit of claim stating inter alia that there is due to her from defendant the sum of $8,818.82. Defendant filed a demurrer to the special count and a plea of the general issue to the common counts, accompanied by an affidavit of merits. On April 9, 1883, after argument, the court sustained the demurrer to the special count (to which ruling plaintiff objected) and set the case for trial at a future day on the issues made by the common counts and plea. One of the errors assigned by plaintiff is that the court erred in sustaining the demurrer. Shortly before the trial defendant filed an amended affidavit of merits. In the special count the allegations are in substance:

That on August 1, 1927, Lawrence P. Romano & Company (hereinafter referred to as Romano & Co.) was an Illinois corporation, authorized under its charter to act "as agent for others in the purchase, sale and management of real estate;" that defendant (hereinafter referred to as the Realty Co.) was and is an Illinois corporation with the same authorized powers; that on said day, at the solicitation of Romano & Co., plaintiff (then being unmarried and having the name of Mary Ellen McKenna) surrendered to Romano & Co. three contracts for the purchase of three parcels of real estate, which contracts had theretofore been entered into between Romano & Co. and plaintiff; that the then agreed value of plaintiff's equities in said parcels of real estate was $3,145; and that in consideration of the surrender and cancellation of the contracts and a cash payment to it of $500, Romano & Co. executed and delivered a "pretended" contract for the sale of certain other real estate to plaintiff at a total price of $11,750, upon which amount the agreed valuation of $3,145, and the cash payment of $500, were credited. (Here is set forth a copy of the contract, as executed under seal by the parties on August 1, 1927, together with the endorsements thereon of the monthly and other payments of principal and interest made by plaintiff, - the first on September 7, 1927, and the last on June 4, 1931.) That sometime between September 7th and November 3rd, 1927, plaintiff was informed by Romano & Co. that the contract had been assigned and transferred by it to the Realty Co. (defendant); that the three partial payments made by plaintiff to Romano & Co. on the contract, on November 3, 1927 and prior thereto, aggregated $378.72; that <u>after</u> November 3, 1927, plaintiff made all of the endorsed partial payments to the Realty Co., the aggregate amount of which, together with legal interest from the respective dates of payments, is $5,316.65; that by the terms of the contract the final payment became due on August 1, 1930; and that on that date an "alleged extension agreement" was entered into between the Realty Co. and plaintiff, under her then name of Mary Ellen Leonard. (Here is set forth a copy of the extension agreement.) That thereafter plaintiff paid to the Realty Co. the various payments specified to be made in the extension agreement "up to and including the payment of May 1, 1931;" and that in addition thereto she paid to the Realty Co., as a commission for the granting of the extension, the sum of $129.

That the "pretended" contract of August 1, 1927, purported to be executed by Romano & Co., acting as agent, "on behalf of an undisclosed principal," whose name was not disclosed to plaintiff; that the seal attached to the contract "is the seal of the agent and not the principal, and that, therefore, the principal is not bound or in any way obligated on said contract;" that Romano & Co., being authorized under its charter to act only as agent for others and being prohibited by the Illinois statutes from engaging in the purchase and sale of real estate, "is not obligated on said contract" and that, therefore, the same "is void and of no effect;" that the contract, being void in its inception, "is void in the hands of the assignee" (the Realty Co.); that the payments made to the Realty Co. are payments made under a void agreement; and that, hence, the Realty Co. "became and is indebted to plaintiff" in the sum of $7,000, etc.; wherefore plaintiff brings her suit, etc.

It will be noticed from the allegations of the count that plaintiff is not suing <u>upon</u> the claimed unlawful contract, or according to its terms, but rather on the theory of an implied contract of

[illegible]

It will be noticed from the allegations of the court that plaintiff's not only [illegible] the claimed material evidence, or assert-ing to its nature, but rather on the theory of an implied contract of

the Realty Co. to return money which in equity and good conscience it has no right to retain. As said in Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 60, "to maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

In the amended affidavit of merits of the Realty Co., by its president, Arthur L. Weinschenk, accompanying its plea of the general issue to plaintiff's common counts, it is stated in substance that the contract of August 1, 1927, between Romano & Co., as first party, and plaintiff, as second party (mentioned in plaintiff's affidavit claim) "was and is a good, valid and subsisting contract between said parties;" that the assignment of the contract from Romano & Co. to the Realty Co., (also mentioned in plaintiff's affidavit of claim) "is a good and valid assignment of said original contract;" that the agreement of extension, made between the Realty Co. and plaintiff on August 1, 1930, (also mentioned in plaintiff's affidavit of claim), "is a good, subsisting and binding agreement between the parties thereto;" that Romano & Co., "representing as agent the owner," had full right and lawful authority to enter into the contract of August 1, 1927, "by virtue of its certificate of incorporation under the laws of Illinois;" that said contract "is not void for want of mutuality;" and that there is not due to plaintiff from defendant (Realty Co.) the sum of $5,[illegible], or any sum whatsoever.

On the trial plaintiff testified at considerable length as a witness in her own behalf. She called Lawrence S. Romano and two others as her witnesses and they gave testimony. She also introduced in evidence certain instruments and documents, including (a) the original contract of August 1, 1927, between Romano & Co. and plaintiff; (b) the extension agreement of August 1, 1930, between the Realty Co. and plaintiff; (c) a warranty deed of M. A. Seymour,

a bachelor, dated May 19, 1926, and recorded May 21, 1926, conveying certain premises (of which the three lots mentioned in the contract of August 1, 1927, are a part) to Lawrence F. Romano, individually; (d) a deed of Charles Erdman and wife, dated May 20, 1926, and recorded May 21, 1926, conveying the same premises to Lawrence F. Romano, individually; (e) a warranty deed of Lawrence F. Romano and wife, dated October 17, 1927, and recorded October 20, 1927, conveying the same three lots, mentioned in the contract in question, to Louis C. Marks, individually, (at that time Marks was the secretary and treasurer of the Realty Co.); (f) the certificate of incorporation in Illinois of the Realty Co., on May 22, 1924, in which it is stated that the object for which it is formed is "for the purpose of acting as agent for others in the purchase, sale, renting and management of real estate and leasehold interests * * in the negotiation of loans on real estate and leasehold interests," etc.; and (g) a certified copy of a decree of the superior court of Cook County, entered on June 9, 1931, wherein it is adjudged in substance that, by reason of the failure of Romano & Co. to make an annual report as required by the Illinois statutes and on motion of the Attorney General of the State, said corporation "is hereby dissolved."

In the contract, dated August 1, 1927, signed by Romano & Co., "by Lawrence F. Romano," as first party, and by plaintiff, as second party, and sealed by the respective parties, it is provided in substance:

That if the second party shall make and perform all of her agreements as stated, the first party "will cause to be conveyed to the second party, in fee simple, by a good and sufficient deed of conveyance by the owner," the following premises: (Here are described the three lots); that the second party agrees to pay to Romano & Co., at its Chicago office, "the sum of $11,750, in the manner following: $3645 on the execution of this contract, the receipt of which is hereby acknowledged, and the balance of $8,105, in monthly installments of $125, or more, each, - the first payment on September 1, 1927, and one payment on the first day of each and every month until August 1, 1930, at which time the entire unpaid balance shall become due and

a Summons, dated July 13, 1966, and received July 14, 1966, requesting certain premiums (of which the three Lots mentioned in the contract of August 4, 1965, are a part) in Lawsuit 7. Summons, Satisfaction (4) a deed of Shelter Issues and Gifts, dated July 30, 1966, and received July 15, 1966, conveying the same premises to Lawsuit 8, Summons, Satisfaction (5) a warranty deed of Insurance 7, Summons and wife, dated October 17, 1967, and recorded October 8, 1967, conveying the same Lots, mentioned in the contract in question, to Louis E. Porter, individually, (at that time Sheba was the secretary and treasurer of the Realty co.); (6) the certificate of incorporation in Illinois of the Realty Co., on May 22, 1964, in which it is stated that the objects for which it is formed is "for the purpose of acting as agent for others in the purchase, sale, renting and management of real estate and financial interests" ; in the negotiation of loans on real estate and financial interests" etc.; and (7) a certified copy of a decree of the chancery court of Cook County, entered on June 5, 1972, wherein it is adjudged in substance that, by reason of the failure of Summons & Co. to make an annual report as required by the Illinois statutes and on motion of the Attorney General of the State, said corporation "is hereby dissolved".

In the contract, dated August 4, 1965, signed by Summons & Co., "by Lawrence D. Summons," as first party, and by plaintiff, as second party, and notice by the respective parties, it is provided in substance:

That if the second party shall make and perform all of her agreements as stated, the first party "will cause to be conveyed to the second party, in fee simple, by a good and sufficient deed of conveyance for the money," the following premises: (here the property in the three Lots) that the second party agrees to pay to Summons & Co., or its finance office, "the sum of $12,750, in the manner following: $1500 on the execution of this contract, the receipt of which is hereby acknowledged, and the balance of $11,250, in monthly installments of $150, on more, each, - the first payment on September 1, 1967, and one payment on the first day of each and every month until the total sum of $1250, at which time the entire unpaid balance shall become due and

payable," with 5 per cent. interest, etc.; and that the second party also agrees to pay all taxes, special assessments, etc.

That it is mutually agreed between the parties (1) that "when the entire purchase price has been paid hereunder, together with interest," and all of the covenants of the second party have been performed, the first party "will deliver to the second party an owner's guaranty policy in the usual form, issued by the Chicago Title & Trust Co.," etc.; (2) that the first party "will only recognize such payments on this contract as shall be receipted for by its authorized representative;" that "in case the second party shall fail to make said payments or any of them when due, then this contract shall, at the option of the first party, become null and void, and the rights of the second party herein shall be cancelled, and the amounts paid on this contract shall be forfeited to the first party, and shall remain its property, as liquidated damages, or at the option of the first party the entire balance due under this contract shall immediately become due and payable;" * * (4) that "no failure on the part of the first party to enforce any right accruing to it because of any default of the second party in promptly performing any of the provisions hereof, * * shall be construed to operate as a waiver of any of the provisions of this contract;" and (5) that "the interest of the second party hereunder shall not be assigned * * without first obtaining the written consent of the first party." (Here follow numerous other provisions not now material. And there are endorsed on the contract many partial payments, for principal or interest, made by plaintiff - the last payment being on June 4, 1931. Many of the later endorsed payments are identified by the initials "L.C.M." - being said Louis C. Marks).

In the extension agreement of August 1, 1930, executed by the Realty Co. as first party and plaintiff as second party and being under seal, it is stated and provided in part as follows:

The first party is the legal holder of a certain "Real Estate Sales Contract," originally entered into by and between Romano & Co., as first party, and the "undersigned" (plaintiff), as second party, under date of August 1, 1927, and which contract provides "for the sale and purchase of the following described real estate": (Here are described the three lots); and which contract "was duly assigned and delivered" by Romano & Co. and Lawrence P. Romano to the Realty Co., which "is now the legal holder and owner of said real estate sales contract."

The second party, in consideration of her agreement hereinafter made, desires to have the principal balance of $4,080, and accrued interest due, "or a total of $4,755.90, extended to become due and payable in the following manner: $55.90 on or before August 6, 1930; $75 on or before November 1, 1930, $75 on or before December 1, 1930, and $75 on or before January 1, 1931, and $75 on each month thereafter until and including July 1, 1931, and $4,025 on or before August 1, 1931."

Therefore, the first party "hereby agrees to extend the payment of $4,755.90, as above stated, payable in the foregoing installments, so long as said second party shall promptly pay interest thereon from August 1, 1930, at the rate of 6% per annum" at the office of the Realty Co. in Chicago, "and shall further keep and perform the covenants and agreements in said real estate sales contract contained."

In case the second party "shall fail to keep and perform the covenants herein stated, and/or shall default in the payment of any one of the foregoing installments of principal and interest, as extended, she hereby agrees that any or all money or moneys, heretofore paid in on said real estate sales contract up to the time of such default, shall be forfeited as liquidated damages; and that then, and in that event, said first party (Realty Co.) shall have the right and option to cancel the said real estate contract, which shall then and there become null and void, and the ownership of the aforementioned lots shall then revert to the first party (Realty Co.); and said second party, in case of default of any of the terms and provisions of this extension agreement, waives any and all notices of forfeitures, and agrees that the cancellation of the said real estate contract shall then and there become automatically effected."

It is to be noticed that in case plaintiff should make all of the deferred payments to the Realty Co., and fully pay to it the balance of $4,755.90, and all interest accruing, etc., the Realty Co. does not agree to convey, or cause to be conveyed, the said three lots to plaintiff.

Inasmuch as we have reached the conclusion, after considering all of the evidence introduced by plaintiff, that the court erred in directing a verdict for defendant and in entering the judgment appealed from, we shall refrain from a detailed discussion of plaintiff's testimony and that of her other witnesses, particularly in view of the probability that another trial may be had. Suffice it to say that it is our opinion that plaintiff's evidence sufficiently showed, prima facie, such a state of facts as under the law entitled her to recover back from the Realty Co. the various amounts of money she had paid to it under and by virtue of said real estate contract of August 1, 1927, and under and by virtue of said extension agreement of August 1, 1930. We regard both the real estate contract and the extension agreement as lacking in mutuality, and, therefore, void. As to the contract of August 1, 1927, we are of the opinion that it cannot be construed as being binding upon the then owner of the property, Lawrence F. Romano, the undisclosed principal, because it was executed by an agent, Romano & Co., and in the name of that agent and under the respective seals

of the parties. In Walsh v. Murphy, 167 Ill. 228, 231, it is said: "The rule in regard to instruments under seal made by an agent is, that in order to bind the principal and to make it his contract it must purport on its face to be his contract and the seal must purport to be his. An agent cannot ordinarily bind the principal by a sealed contract executed in his own name, nor can the principal ordinarily avail himself of such a contract and sue the other contracting party thereon. An undisclosed principal whose authorized agent has made such a contract in his behalf can neither sue nor be sued on it." (See, also, Harms v. McCormick, 132 Ill. 104, 110; Beilin v. Krenn & Date, 350 Ill. 284, 290.) And we do not think that the holdings and decision in Webster v. Fleming, 178 Ill. 140, 149, relied upon by appellee's counsel, should be considered, under the particular facts of the present case, as militating against the application here of the above stated rules.

Nor, in our opinion, can the contract of August 1, 1927, be considered as binding upon the agent corporation, Romano & Co., to convey the property to plaintiff, because a corporation under our statutes is prohibited from acquiring and owning the real estate for the purpose of resale, and, hence, cannot make a valid contract to convey the property. (See Section 10 Illinois Corporation Act, Cahill's Stat. 1931, Chap. 32, p. 740; People v. Pullman's Car Co., 175 Ill. 125, 142; Imperial Building Co. v. Chicago Board of Trade, 238 Ill. 100, 105.) Nor can it do indirectly what it cannot do directly. (Wacker v. Taylor, 252 Ill. 424, 430.) Furthermore, inasmuch as Romano & Co. was an "agency" corporation and evidently organized under the provisions of section 3 of said Corporation Act, we are of the opinion that it had no power to contract to sell the property to plaintiff, where in the particular contract it assumed the primary obligation or liability, thereunder, under the guise of

of the property. In Gulde v. Gulde, 147 III. 377, 379, it is to wonder "the rule is varied in instruments under seal made by an agent in that the agent is entitled to sign the principal's name to such instrument in which case the principal is bound on its face to be the party contracting and the real party to be bound. In such cases evidence of the principal by a sealed contract executed in his own name, nor can the principal effectually avoid liability at least a contract and use the other contracting party thereon. In mechanical principal where instrument signed has made such a contract in his behalf the principal is not bound on it." (See also Dunn v. Dougherty, 150 III. 304, 310; Mullin v. Tyson & Bros., 280 III. 494, 500.) Can we do not think that the instrument and relates to Tobias v. Tobias, 318 III. 144, 149, relied upon by appellee's counsel, should be considered, under the particular facts of the present case, as militating against the application here of the above stated rules.

Nor, in our opinion, can the contract of August 1, 1937, be considered as standing upon the same representations, because it is, in our opinion, the property of plaintiff, because a corporation under our statutes is prohibited from conducting and owning the real estate for the purpose of owning, and, hence, cannot make a valid contract to convey the property. (See Section 31 Illinois Corporation Act, Smith's Stat. 1937, Chap. 32, p. 771; Steele v. Milliner's Inc. Co., 179 III. 129, 134; Commercial Building Co. v. Chicago Board of Trade, 208 III. 320, 322.) Nor can it be instructed what it cannot do directly. (Tobias v. Tobias, 318 III. 144, 149.) Furthermore, because such as Vincent & Co. was an "agency" corporation and strictly organized under the provisions of section 3 of said Corporation Act, we are of the opinion that it had no power to contract to sell the property in plaintiff, where in the particular contract it assumed the primary obligation of liability. Therefore, under the rules of

merely acting as the agent of an undisclosed owner. We regard such assumption and the making of such a contract as beyond the scope of its powers, rendering the contract unlawful and void. In Calumet, etc. Co. v. Conkling, 273 Ill. 318, 326, it is said:

"Contracts made by a corporation which are beyond the scope of its powers are unlawful and void and cannot be enforced, * *. 'The objection to the contract is, not merely that the corporation ought not to have made it but that it could not make it. The contract can ot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it.' (Citing Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. pp. 59-60.) That case was quoted with approval in National Home Building and Loan Ass'n v. Home Savings Bank, supra, (181 Ill. 42), where it is also said (p. 48): 'No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.' That case was followed and approved in North Avenue Building and Loan Ass'n v. Huber, supra, (270 Ill. 82)."

And the contract being void, not only because lacking in mutuality but because beyond the powers of Romano & Co. to make it, and also beyond the powers of the Realty Co., assignee, to act under it, plaintiff is entitled to recover back in this assumpit action such moneys as it appears she paid to the Realty Co. (Tietke v. Union Bank of Chicago, 269 Ill. App. 341, 344; Usher v. Hulbert, 225 Ill. App. 321, 330-1; Bradford v. City of Chicago, 25 Ill. 411, 424; Laflin v. Howe, 112 Ill. 253, 262.) Furthermore, the contract between Romano & Co. and plaintiff being void when made, no validity can be imparted to it by the subsequent assignment of it by Romano & Co. to the Realty Co., or by any partial performance of it by either of the parties. (County of Cook v. Lowe, 23 Ill. App. 649, 652.)

If it should be contended that the contract should not be considered unilateral on the ground that it could be specifically enforced in equity by plaintiff as against Lawrence P. Romano as the agent of Romano & Co. in signing it, the answer to such contention would be that Romano, acting as agent for the company in the signing

merely acting as the agent of an undisclosed principal. In regard such agreements and the making of such a contract as beyond the powers of the company, rendering the contract unlawful and void. In [illegible], etc. Co. v. [illegible], 278 Ill. 342, 346, it is said:

> "Contracts made by a corporation which are beyond the scope of its powers are unlawful and void and cannot be enforced. * * *. 'The objection to the contract is, not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified by either party because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it.' (Citing Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 59-60). That case was approved in [illegible] Gas Light and Coke Co. v. [illegible], 205 Ill. 482), where it is also said (p. 495): 'No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.' That case was followed and approved in [illegible] v. [illegible], 1920 (Ill. 333)."

And the contract being void, not only because illegal in morality but because beyond the powers of [illegible] & Co. to make it, and also beyond the powers of the Realty Co., assignee, to act under it, plaintiff is entitled to recover back in this proceeding such moneys as it appears she paid to the Realty Co. (Pixley v. Union Bank of Chicago, [illegible] Ill. App. 342, 346; [illegible] v. [illegible], 246 Ill. App. 488, 490-1; [illegible] v. City of Chicago, 88 Ill. App. 484; Griffin v. Berry 210 Ill. 407, 202.) Furthermore, the contract between [illegible] & Co. and plaintiff being void when made, no validity can be imparted to it by the subsequent assignment of it by [illegible] & Co. to the Realty Co., or by any partial performance of it by either of the parties. ([illegible] v. [illegible], 25 Ill. App. 443, 488.)

If it should be contended that the contract should not be considered unlawful on the ground that it could be specifically enforced in equity by plaintiff as against [illegible], as the agent of [illegible] & Co. in signing it, the answer to such contention would be that [illegible], acting as agent for the company in the signing

of an *ultra vires* contract, could not be held personally liable as such agent on the contract. (*Tallmadge v. Iowa Paper Bag Co.*, 108 Iowa 357, 362-3; *Lawson, Thorman & Co. v. Wilcox*, 33 Ill. 532, 534; *Kaegebein v. Dunker*, 81 Ill. 206, 213; *Equitable Trust Co. v. Taylor*, 330 Ill. 42, 47.)

We conclude that the court erred in sustaining defendant's demurrer to the special count in plaintiff's declaration. We think that the count stated a good cause of action. And the court also erred in instructing the jury, at the close of plaintiff's evidence, to return a verdict for defendant and in entering the judgment appealed from on such verdict. Accordingly, the judgment of the superior court is reversed and the cause remanded with directions to overrule said demurrer to said special count, and to allow defendant to plead thereto if it so desires, and that there be another trial on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

of an ultra vires contract, could not be held personally liable as such agent on the contract. (Philmany v. Iowa Paper Bag Co., 108 Iowa 357, 362-3; Duncan, Sherman & Co. v. Niles, 32 Ill. 532, 534; Hancock v. Yunker, 83 Ill. 208, 213; Equitable Trust Co. v. Taylor, 330 Ill. 42, 47.)

We conclude that the court erred in sustaining defendant's demurrer to the special count in plaintiff's declaration. We think that the count stated a good cause of action. And the court also erred in instructing the jury, at the close of plaintiff's evidence, to return a verdict for defendant and in entering the judgment appealed from on such verdict. Accordingly, the judgment of the superior court is reversed and the cause remanded with directions to overrule said demurrer to said special count, and to allow defendant to plead thereto if it so desires, and that there be another trial on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

of an [illegible])

We conclude that the lower court erred in sustaining defendant's demurrer to the special count in plaintiff's declaration. We think that the count states a good cause of action, and the court also erred in instructing the jury at the close of plaintiff's evidence to return a verdict for defendant and in entering the judgment appealed from on such verdict. Accordingly, the judgment of the superior court is reversed and the cause remanded with directions to overrule said demurrer to said special count, and to allow defendant to plead thereto if it be so advised, and that there be another trial on the merits.

Reversed and remanded with directions.

Sullivan, P. J., and Scanlan, J., concur.

36474

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JOHN W. McDOWELL, JOSEPH K. BRITTAIN, and VAL JOBST, Jr., and DIME SAVINGS AND TRUST CO., executors of the last will of George J. Jobst, deceased,
Defendants in Error,

v.

GEORGE C. HIELD and WILLARD J. HIELD,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

272 I.A. 603

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On December 9, 1930, plaintiffs brought suit in assumpsit, upon six notes, all dated January 10, 1926, and executed, indorsed and delivered by defendants in payment of a part of the agreed purchase price of about 4,000 acres of land in the State of Florida. The notes with others were secured by defendants' mortgage on the land. Plaintiffs' declaration consisted of a special count and the common counts. Copies of the notes were attached to the declaration. Three of them, each for $18,333.33, matured on January 10, 1928, and three, each for $16,666.67, on January 10, 1929. All bore interest from date at 6 per cent per annum until maturity, payable semi-annually, and at 7 per cent per annum after maturity, and all provided that in case suit should be brought for their collection defendants were to pay reasonable attorney's fees. Certain indorsements of semi-annual interest payments made by defendants appear on each note. Accompanying the declaration is plaintiffs' affidavit of claim made by Joseph K. Brittain, wherein he states that he is the duly authorized agent of plaintiffs and that a large sum (naming

[illegible]

[illegible]

[illegible]

it) is due to plaintiffs from defendants for the principal of said notes and unpaid interest, "together with reasonable attorney's fees, provided for in the notes, as may be fixed by the court upon the hearing." To the declaration defendants filed a plea of the general issue, accompanied by an affidavit of merits by George C. Hield, one of the defendants, and a notice in writing under the plea of special matters intended to be relied upon by defendants as a defense on the trial, as provided in section 46 of the Practice Act. The matters stated in the affidavit and in the notice are substantially the same. A trial was had before a jury during May, 1932. Plaintiffs introduced in evidence the notes sued upon and also the mortgage. They also called as a witness said Brittain, who testified that there was due for principal $105,000, and for unpaid interest to May 10, 1932, $20,824.92, making a total sum of $125,824.92. And evidence was introduced showing that reasonable attorney's fees, as provided in the notes, would be 5 per cent of said total sum, or $6,291.24, and that the aggregate sum claimed to be due from defendants was $132,116.16. Plaintiffs then rested their case.

On behalf of defendants the principal witnesses were George C. Hield and Maurice A. Baranoik, defendants' attorney at Chicago. Defendants also called three other witnesses and introduced the written agreement, dated September 9, 1925, for the purchase of the land, and several other writings. During the cross-examination of some of defendants' witnesses, plaintiffs caused to be identified certain other instruments or writings, and, out of order and during the progress of defendants' case, were allowed by the court over objection to introduce them in evidence. At the conclusion of defendants' case as presented, the court instructed the jury to return a verdict finding the issues for plaintiffs and assessing their damages for the full amount of their claim,

it) is due to plaintiffs from defendants for the principal of said notes and unpaid interest, "together with reasonable attorney's fees, provided for in the notes, as may be fixed by the court upon the hearing." To the declaration defendants filed a plea of the general issue, accompanied by an affidavit of merits by George C. Hield, one of the defendants, and a notice in writing under the plea of special matters intended to be relied upon by defendants as a defense on the trial, as provided in section 46 of the Practice Act. The matters stated in the affidavit and in the notice are substantially the same. A trial was had before a jury during May, 1932. Plaintiffs introduced in evidence the notes sued upon and also the mortgage. They also called as a witness said Brittain, who testified that there was due for principal $105,000, and for unpaid interest to May 10, 1932, $20,824.92, making a total sum of $125,824.92. And evidence was introduced showing that reasonable attorney's fees, as provided in the notes, would be 5 per cent of said total sum, or $6,291.24, and that the aggregate sum claimed to be due from defendants was $132,116.16. Plaintiffs then rested their case.

On behalf of defendants the principal witnesses were George C. Hield and Maurice A. Barancik, defendants' attorney at Chicago. Defendants also called three other witnesses and introduced the written agreement, dated September 9, 1925, for the purchase of the land, and several other writings. During the cross-examination of some of defendants' witnesses, plaintiffs caused to be identified certain other instruments or writings, and, out of order and during the progress of defendants' case, were allowed by the court over objection to introduce them in evidence. At the conclusion of defendants' case as presented, the court instructed the jury to return a verdict finding the issues for plaintiffs and assessing their damages for the full amount of their claim,

it) is done to plausibility from documents for the principal of such works and models described, "together with considerable literature", dealing for in the notes, so only be flown by the water upon the boarding." To the continental documents title a plan of the general issue, accompanied by an affidavit of service for Europe d. Ghent, one of the returns, and a series in certain months the plan of general matters included in an title upon it described as a defense on the trial, as provided in section 6c of the Judicial act. The matters stated in the affidavit and in the notice are independently the same. A trial was had before a jury during May, 1910. Plaintiff introduced in evidence the patent and upon and also the notices. They also called as a witness Wm Griffiths, the inventor that there was one for principal fact, and the engineer described by Mr. Ghent, testified a total was at [illegible]. and evidence was introduced showing that reasonable diligence, as provided in the notes, would be a per cent of said total sum, or [illegible], and that the aggregate was claimed to be due from defendants [illegible]. Plaintiff then rested their case.

In behalf of defendants the principal witnesses were George E. Ghent and Newton A. Bonnell, defendants' attorney at Chicago. Plaintiffs also called these other witnesses and testified the written agreement, dated September 9, 1910, for the purchase of the land, and several other writings. In the course examination of some of defendants' witnesses, plaintiff sought to be identified certain other instruments or writings, but, as of order not during the progress of defendants' case, this objected by the court upon objection to introduce them in evidence. In the examination of defendants' witnesses, the court instructed the jury to return a verdict finding the issues for plaintiff and assessing their damages for the full amount of their claims.

$132,116.16. The jury returned such verdict, and on June 15, 1932, the court, after overruling motions for a new trial and in arrest of judgment, entered judgment in said sum against defendants, which by the present writ of error they seek to reverse.

Defendants' main contention is that the court erred in directing a verdict and in entering the judgment on such verdict. They argue in substance that they sufficiently proved such a case for damages, resulting from false and fraudulent representations of plaintiffs' authorized agent (Brittain) upon which they relied, as warranted a jury passing upon the question whether they were not entitled to damages, in recoupment or offset as against their liability on the notes sued upon. The special matters of fact, as set forth in defendants' said written notice and also in their affidavit of merits are in substance as follows:

That on or about September 9, 1925, plaintiffs entered into a contract with defendants, under which they, in the name of Joseph K. Brittain, agreed to sell to defendants certain property near Melbourne, Brevard county, Florida, consisting of approximately 4,000 acres of land in the Melbourne-Hillman Drainage District; that the contract provided that defendants should take the property "subject to the general taxes" for the year 1925 and subsequent years, and "also subject to the drainage taxes" of said Drainage District for the year 1925 and subsequent years; that in connection with the contract said Brittain handled all the negotiations in plaintiffs' behalf; that prior to and at the time of the closing of the deal defendants stated to Brittain that one of the important factors in defendants' determination as to whether or not they would buy the land, was the amounts of the general and drainage taxes, which would have to be paid from year to year; that thereupon plaintiffs, by and through said Brittain, stated to defendants, and each of them, that "the general taxes were approximately $1,000 per year and the drainage taxes of said Drainage District were and would be approximately $4,000 per year for a period of 28 years;" that defendants believed said statements and representations and relied upon them, and thereupon entered into the contract mentioned, whereby the land was to be sold to them for $241,600; that thereafter, on January 10, 1926, the deal was closed and defendants purchased the land for said sum (less commissions), - defendants paying therefor $82,200 in cash and giving their notes for the balance, secured by the mortgage on the land; that the notes sued upon constitute a part of the notes given to plaintiffs at the time of the purchase; that said representations of plaintiffs, by and through said Brittain, with reference to said general taxes and drainage taxes, "were wholly and totally false and were known to be untrue by said Brittain, or, if not known to be untrue by him, were made without knowledge of their truth and for the purpose of inducing defendants to purchase

[illegible]. The jury returned such verdict, and on June 24, 1922, the court, after overruling motions for a new trial and in arrest of judgment, entered judgment in said two original actions, which by the process acts of error they seek to reverse.

Defendants' main contention is that the court erred in directing a verdict and in entering the judgment on such verdict. They argue in substance that they sufficiently proved such a case for damages, resulting from false and fraudulent representations of plaintiffs' authorized agent (hereinafter spoken of as vendors) as would justify the question whether they were induced to complete, in reliance on it, their contracts of purchase liability on the notes sued upon. The special allegations of fraud, as set forth in defendants' sole written motion and also in their affidavit of merits are in substance as follows:

That on or about September 5, 1920, plaintiff's agents came to contract with defendants, under which that, in the case of Joseph E. Dotterich, agreed to sell to defendants certain property known as Dotterich, located nearby, Florida, consisting of approximately 4,000 acres of land in the Indiantown-Jupiter territory (hereinafter sometimes referred to as the "property") for the price [illegible] "subject to the general terms" for the year 1921 and thereafter years, and "also subject to the previous terms" of said drainage district for the year 1920 and subsequent years; that in connection with defendants' purchase, the vendors represented that the property was the finest and most productive property in the district, and that the drainage district was in operation or not, they stated that the land, on the completion of the project and drainage, would have to be paid from year to year; that drainage district, by and through said drainage, stated to defendants, and said at them, that "the general taxes were approximately $1,000 per year and the drainage taxes of said drainage district were and would be approximately $1,000 per year for a period of 40 years"; that defendants believed said representations and relied upon them, and accordingly entered into the contract mentioned, thereby the land was to be sold in them for $[illegible] that [illegible], on January 10, 1921, the deed was placed and delivered vendors the land for said sum (less commissions); a [illegible] [illegible] in such [illegible] state notice for the [illegible], [illegible] by the attorney of the land that the notes sued upon [illegible] a part of the purchase price of the notes given in payment, or on the sale of the property said representations of plaintiffs, by and through said [illegible] with defendants as said general terms and drainage taxes, "were totally false and were known to be false by said plaintiffs, or [illegible] and totally false and were known to be false by said plaintiffs, or [illegible] it was known to be false by them, were made without knowledge of their truth and for the purpose of inducing defendants to purchase

said property;" that said general taxes "were approximately $1200 a year instead of approximately $1,000 a year;" that said drainage taxes of said Drainage District "were approximately an average of $12,400 per year for 23 years instead of approximately $4,000 per year for 23 years, so that the drainage tax to defendants was approximately $8,400 per year for 23 years in excess of the amount represented and upon the basis of which defendants purchased the property;" that in entering into the contract and consummating the purchase defendants relied upon said representations and believed them to be true; that they did not discover their falsity "until some time after the closing of the deal;" and that all of the negotiations of the parties, as well as the signing of the contract and the consummation of the deal, were had in Chicago, Illinois.

These defendants further state that "by reason thereof they have been greatly damaged;" that their damages, as a result of the misrepresentations relied upon by defendants as to the subject matter of the contract, "is the amount provided for in said notes remaining unpaid;" wherefore, there is no balance whatsoever due upon or on account of said notes, or any of them, and plaintiffs will take notice that "upon the trial the amount of said damages owing from plaintiffs to defendants will be set off and recouped against any demand of plaintiffs to be proved on the trial."

As we have reached the conclusion that the court erred in directing the verdict for plaintiffs and that for the error a new trial should be had, we refrain from outlining or discussing the evidence introduced by defendants. Suffice it to say that we are of the opinion that defendants' evidence, in support of their claim for damages as against the total amount sought to be recovered by plaintiffs on said notes, was such as required that the issues be submitted to the jury for its determination rather than the court's. This is in accord with numerous decisions of our Supreme Court, some of which are: Frazer v. Howe, 106 Ill. 563, 573-4; Libby, McNeill & Libby v. Cook, 242 id. 206, 213; Bailey v. Robison, 233 id. 614, 616; Bechtel v. Marshall, 283 id. 486, 490-1.

Counsel for plaintiffs here contend in substance that it is the law that one must act promptly where he seeks to disaffirm or rescind his contract on the ground of fraud. The contention is here without merit, and the cases cited in support thereof are not in point, for the reason that defendants are not seeking to disaffirm or rescind their contract, but on the contrary are affirming it

and seeking to recoup, as against plaintiffs' claim their damages occasioned by plaintiffs' claimed false and fraudulent representations, which induced them to enter into the contract. In White v. Sutherland, 64 Ill. 181, 191, it is said: "We are of the opinion, in all cases of fraud, the vendee, who alone has the right to claim a rescission, may remain silent and bring his action to recover damages for the fraud, or may rely on it by way of defense to the action of the vendor, although there has been full acceptance by him of the property with knowledge of its defects; and this, we understand is the doctrine of well adjudged cases. * * An affirmance of the contract by the vendee with such knowledge merely extinguishes his right to rescind the sale. His other remedies remain unimpaired. The vendor can never complain that the vendee has not rescinded. Fraud and damage have ever been regarded as a solid foundation for an action." In 8 Am. & Eng. Ency. of Law (1st Ed.) p. 810, sec. 11, it is said: "The defrauded buyer may, instead of rescinding the contract, stand to the bargain, even after he has discovered the fraud, and recover damages therefor, or recoup in damages, if sued by the vendor." (See, also, Peck v. Brewer, 43 Ill. 54, 61; Allen v. Hemm, 197 id. 486, 494-5; Dunlap v. Peirce, 336 id. 178, 184.)

The present record discloses that among the instruments or writings, introduced in evidence by plaintiffs during the cross-examination of defendants' witnesses, was a certain receipt signed by George C. Hield, for a certain opinion of one Hubbard as to the title of the land in question, which plaintiffs claim showed that the yearly drainage taxes on the property was greatly in excess of the amount of those taxes that defendants claimed that Brittain had represented them to be. And it appears that Hield on receipt of the opinion turned the same over, without examining it, to defend-

ants' attorney. It was claimed by plaintiffs on the trial in substance that by the receipt of said opinion defendants had the opportunity of becoming advised that the representations of Brittain as to the yearly amount of the drainage taxes were incorrect and that defendants were negligent, etc. Whether or not they were negligent under all the evidence was a question of fact for the jury to determine. (Schwabacker v. Riddle, 99 Ill. 343, 348; Kohl v. Abram, 210 Ill. 216, 220; Cantwell v. Harding, 155 Ill. App. 578, 581.)

Should the jury have determined, if the case had been submitted to them, that defendants were entitled to damages as against plaintiffs' claim, it is well settled that the measure of those damages is "the difference between the value of the property as it is and what it would be worth if the representations had been true." (Schwitters v. Springer, 236 Ill. 271, 274; Drew v. Beall, 62 Ill. 164, 168; Antle & Bro. v. Sexton, 137 Ill. 410, 415-6; Ginsburg v. Bartlett, 258 Ill. App. 14, 35.) During the trial defendants sought to introduce testimony of a witness or witnesses showing their damages according to such measure, but the court would not allow the admission of such evidence. In this ruling we are of the opinion, in view of defendants' admitted evidence, that the court erred. We think that defendants should have been allowed, as a part of their case for damages, to introduce competent evidence along this line.

The judgment of the superior court in question should be reversed and the cause remanded. It is so ordered.

REVERSED AND REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

ants' attorney. It was claimed by plaintiffs on the ground in substance that by the erection of said storage warehouse and the practicality of becoming certain that the improvements of Building [illegible] in the vicinity amongst of the business towns were in-[illegible] and that [illegible] were worthless, and [illegible] they were mistaken and in reliance on a condition of that for the jury to discover. [illegible] v. Stanley, 40 Ill. 222, 240; Dick v. Jones, 124 Ill. 224, 230; Dunwell v. Dunlap, 188 Ill. 190, 192.)

Unless the jury were misinformed, if the case had been submitted to them, that defendants were entitled to damages on against plaintiffs claim, it is well settled that the measure of these damages is "the difference between the value of the property as it is and what it would be worth if the representations had been true." (Bonnstetter v. Chapman, 204 Ill. 474, 479; Dunn v. Smith, 45 Ill. 164, 168; Smith v. Jones, 217 Ill. 117, 119, 120-21; Stanton v. Dorsey, 241 Ill. 190, 201.) Under the right statements might be introduced testimony of a witness or witnesses showing their damages according to such measure, but the court would not allow the admission of such evidence. In this ruling we are of the opinion, in view of defendants' numerous evidence that the court erred. We think that defendants should have been allowed as a part of their case (in chief), to introduce competent evidence along this line.

The judgment of the superior court is therefore reversed and the cause remanded. It is so ordered.

Reversed and remanded, for error.

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36522

SARAH BRAVERMAN,
Appellee,

v.

TERRILL BOND & MORTGAGE CO., a corporation, ARTHUR B. KNIGHT and MAE KNIGHT, his wife,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

272 I.A. 603

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a decree of the superior court, entered December 13, 1932, wherein the court, after reciting that complainant had "proved the material allegations of her bill of complaint and was entitled to the relief prayed for therein," and that the master in his report had "correctly found the material facts but had erroneously concluded that complainant was not entitled to any relief, and, therefore, had recommended that the bill be dismissed," which conclusion and recommendation "are hereby disapproved and overruled," ORDERED AND ADJUDGED that complainant's exceptions to the master's report be sustained, that "all findings of fact of the master, except such as are in conflict with the express findings herein, are hereby approved," and that certain conclusions of the master from those findings "are hereby overruled." And the court stated that it "approves and adopts the following findings of the master": (Here are set forth the master's findings of fact as contained in 11 paragraphs, which in this opinion will hereafter be outlined.)

And the court in the decree further stated that it adopts two of the conclusions of the master, viz: (1) that the

[illegible]

[illegible]
Appellee,

v.

[illegible]
[illegible], a corporation,
[illegible] and
[illegible], [illegible],
Appellees.

[illegible]
[illegible], [illegible] County.

272 I.A.603

MR. JUSTICE MCGOOEY DELIVERED THE OPINION OF THE COURT:

By this appeal defendants seek to reverse a decree of the superior court, entered December 21, 1961, vacating the order after trying that complainant had "proven the material allegations of her bill of complaint and was entitled to the relief prayed for therein," and that the master in his report had "correctly found the material facts and erroneously concluded that complainant was not entitled to any relief, and, therefore, had recommended that the bill be dismissed," which conclusion and recommendation "are hereby disapproved and overruled."

Defendants contend that complainant's exceptions to the master's report be sustained, that "all findings of fact of the master, except such as are in conflict with the express findings herein, are hereby approved," and that certain conclusions of the master from those findings "are hereby overruled," and the court enter into its "opinion and adopt the following findings of the master": (Here are set forth the master's findings of fact as contained in 21 paragraphs, which in this opinion will hereafter be omitted.)

And the court in the decree further order that it adopts two of the conclusions of the master, viz: (1) that the

court had jurisdiction of the subject matter and (2) of the parties, but that the court

"overrules his third, fourth, fifth and sixth conclusions, and concludes otherwise, and holds that because of the acts and doings of all of the defendants, in manner and form as above found, they are all liable to complainant; that it would be inequitable to permit the Terrill Bond & Mortgage Co. to secretly acquire title in the name of its employee and to have him execute a bond issue and thereafter placing it in the market, and holding out to the bond purchasers that the bonds were made by a bona fide mortgagor and owner of the premises, when in truth and in fact it owned the mortgaged premises, received all its income and benefited therefrom; that because of such acts complainant, an innocent purchaser for value, sustained damages; and that she is, therefore, entitled to recover from all of the parties the principal and interest due on said bonds - said principal amounting to $18,000, and the interest to date amounting to $2,122."

And the court in the decree further ORDERED AND ADJUDGED

"That the complainant, Sarah Braverman, have and recover of all of the defendants the sum of $20,122, together with her costs in this behalf sustained, * *; that judgment be entered herein in favor of the complainant and against the defendants, Terrill Bond & Mortgage Co., a corporation, Arthur B. Knight and Mae Knight, in the sum of $20,122, besides costs; and that execution be issued," etc.

In complainant's verified bill, filed May 5, 1931, she alleged in substance:

That the Terrill Bond & Mortgage Co. (hereinafter referred to as the Mortgage Co.) is an Illinois corporation, with place of business in Chicago and engaged in the sale of real estate bonds and mortgages.

That prior to March 30, 1928, the Mortgage Co. entered into an agreement with one David Silbert for the purchase of certain improved real estate (describing it), known as the Marquette Terrace Apartments and located at Nos. 6215-25 Indiana avenue, Chicago. (A copy of the agreement is attached to and made a part of the bill. It is dated March 19, 1928, and is signed and sealed by three parties - David Silbert being designated as first part, Arthur B. Knight as second party and the Mortgage Co. as third party.)

That the stated purchase price was $175,000, which the Mortgage Co. agreed to pay by taking the property "subject to an existing first mortgage * * on which there was an unpaid balance of $147,000, and to pay the balance by a purchase money mortgage in the sum of $28,000, and to pro-rate interest and taxes"; that while the purchase money mortgage was to be $28,000, "yet for the purpose of defrauding your oratrix and other purchasers of the bonds and mortgages, the Mortgage Co. provided in said contract to make a purchase money mortgage in the amount of $50,000, and purchased it at the price of $28,000, well knowing then that the property was not worth anything above the purchase price;" that while the Mortgage Co. was the actual purchaser of the property and maker of the purchase money mortgage, "yet for the purpose of defrauding your oratrix and the general public, it caused one Arthur B. Knight, an employee in its office, to be held out as the purchaser of the real estate in

court had jurisdiction of the subject matter and (2) of the

parties, but that the court

"overruled his claim, fourth, laches and clean hands, and
equitable estoppel, and holding that because of the acts and
doings of all of the defendants, in manner and form as above
stated, they are all liable to complainant, that it would be
inequitable to permit the Terrill Bond & Mortgage Co. to assert
equity title in the name of its employee and to have the common
law bond issue and therefore placing it in the mailbox, and holding
out to the bond purchasers that the bonds were sent by a bona
fide purchaser and owner of the property, when in fact the
fact is owned the mortgaged property, receive all the income the
material statements that because of such acts complainant, on
January, purchased for value, mentioned company and then sold it,
therefore, entitled to recover from all of the parties the principal
and interest on said bonds - said principal amounting to $18,000,
and the interest to date amounting to $2,180."

And the court in the Sixth Circuit Court of Appeals

"That the complainant, Jacob Kirkendall, been and remain
of all of the defendants the sum of $18,180, together with interest
made in this behalf mentioned, - " that judgment be entered against
in favor of the complainant and against the defendants, jointly and
severally (-, a corporation, Robert E. Dalton and Max Dalton), in
the sum of $18,180, besides costs and that execution be issued."
etc.

In complainant's verified bill, filed May 5, 1933, she

alleged in substance:

That the Terrill Bond & Mortgage Co. (hereinafter referred
to as the mortgage co.) is an Illinois corporation, with place of
business in Chicago and engaged in the sale of real estate bonds and
mortgages.

That prior to March 31, 1928, the mortgage co. entered
into an agreement with one David Allport for the purchase of certain
improved real estate (described 31) lying on the Lincoln Highway
approaches and located at 2nd, 6332-38 Indiana avenue, Chicago. A
copy of the agreement is attached to and made a part of the bill.
It is dated March 31, 1928, and is signed and sealed by three
parties - David Allport being designated as first party, mortgage co.
(sight) as second party and the mortgage co. as third party.

That the global purchase price was $37,000, which the
mortgage co. agreed to pay by taking the property "subject to an
existing first mortgage - " on which there was an unpaid balance of
$17,000, and to pay the balance by a purchase money mortgage in the
sum of $20,000, and to pay-notes interest and taxes; that while the
purchase money mortgage was to be $20,000, "yet the mortgage of
defendant your assists and other properties of the years and years
there, the mortgage co. granted the said assistant to make a mortgage
money mortgage in the amount of $20,000, and purchased it at the
price of $18,000, with knowing that the property and was
amplified above the purchase price" also while the mortgage co.
was aware particulars of the property and said of the purchase
money mortgage, "yet for the purpose of defrauding your assists and
the general public, it wanted the assist B. Dalton, an employee in
its office, to be held out as the purchaser of the real estate in

his name, and thereafter, on March 30, 1928, it caused said Knight, and Mae Knight, his wife, to make, execute and deliver their 100 gold bonds, in the aggregate sum of $50,000, secured by a junior mortgage on the premises to the Chicago Title & Trust Co., as trustee," which mortgage was duly recorded, and all of said bonds were payable at the office of the Mortgage Co. (A copy of one of the series of$500 bonds of the issue is attached and made a part of the bill.)

That without knowledge of said agreement and believing that said bond issue was made in good faith for the full amount of $50,000, complainant purchased and became the owner of bonds, Nos. 1 to 38, inclusive, aggregating $19,000; that all maturing interest coupons up to March 30, 1931, were paid by the Mortgage Co., but that it made default in the payment of those coupons maturing on said March 30th, and that by reason thereof complainant "declares the whole amount due;" that there is, therefore, due to her the full amount of the principal, $19,000, plus interest from March 30, 1931; and that her demand on the Mortgage Co. for the payment thereof has been refused.

That while it appears from the face of the bonds that they were made by said Knight and wife "yet they are mere dummies for the Mortgage Co.;" that "the Mortgage Co. used their names in many similar fraudulent bond issues which it placed on the market for sale to the general public, and that it developed a scheme or conspiracy to cheat and defraud the public to purchase real estate in the name of said Knight and to ostensibly hold him out to the world as the owner of the property and maker of the bond issue and to thereafter sell such bonds as bona fide mortgage gold bonds;" and that "in the course of their fraudulent schemes," the Mortgage Co. caused similar bonds to be issued in the name of said Knight and wife on certain other properties which the Mortgage Co. had purchased and had caused the title thereto to be taken in the name of said Knight. (The bill then describes several other pieces of property, not involved in the present litigation, and concerning which it is alleged that during the year 1928 the Mortgage Co. had purchased, caused title to be taken in the name of Knight and further caused him to issue and negotiate various bonds thereon.)

That "by reason of the foregoing fraudulent conspiracy" of the Mortgage Co. and said Knight, "its dummy," complainant has "sustained great loss in her investment;" that she "has now discovered the true facts;" that while the Mortgage Co. was in possession of said premises, on which there was the junior mortgage securing the bonds which complainant had purchased and is now the owner as aforesaid, it (the Mortgage Co.) "defaulted in the payment of principal, interest and taxes and suffered a foreclosure of the first mortgage on said premises;" that while it knew that a foreclosure proceeding was instituted, and that the owners of the junior mortgage bonds were made parties defendant as Unknown Owners, it "failed to personally notify your oratrix of said foreclosure, and, in order to conceal the true facts from her, it continued to pay the interest on her bonds until March 1, 1931;" that by reason of the fact that "the Mortgage Co. is the true owner of the property and the party who benefitted from the sale of said bonds and is responsible for placing the bond issue on the market, it ought to be declared in equity as the maker of said bonds and to be primarily liable thereon, together with said Knight and wife;" and that a decree should be entered against all of them finding that they are liable to complainant in the amount due to her on said bonds, etc.

The prayer of the bill is in substance that the three

defendants make answer thereto, but not under oath; that an account be taken; that the Mortgage Co. may be declared to be the maker of the bonds in question and to be primarily liable thereon, together with said Knight and wife; that complainant may be decreed to have a lien upon all property held in the name of Knight, etc.

After the demurrer of the defendants had been overruled, they, on August 4, 1931, filed an answer in which they alleged in substance that the bill did not correctly set forth the provisions of the contract of March 30, 1928; that it provided that Silbert would convey the premises involved to Knight for the sum of $175,000, subject to an unpaid balance of a first mortgage of $147,000, that Knight would execute a junior mortgage bond issue in the sum of $50,000; and that Silbert would sell the same to the Mortgage Co. for the sum of $28,000; that thereafter the parties to the contract "verbally altered it," whereby it was agreed that Silbert would accept the junior mortgage bonds to the extent of $28,000 "in full payment of said purchase price;" that thereupon Knight retained the balance ($22,000) of said bonds, and none of the bonds of said balance were sold, either by him or the Mortgage Co., to any person whomsoever; that Silbert held the title to the real estate for one A. Salzman, who was the true and actual owner thereof and for whom Silbert acted; that Salzman actually received the said $28,000 worth at par value of said bonds; that at the time of the execution of the contract, and prior to the execution of the $50,000 junior mortgage, the premises were encumbered with another junior lien described in the contract in the sum of $20,000, which lien was to be removed from record and released upon the delivery of said $28,000 worth at par of said junior mortgage bonds to said Silbert; that neither the contract was made nor the junior bond issue created for the purpose of defrauding complainant or any other person; and

differences said issues involved, but not where said that an account be taken that the Mortgage Co. may be declared to be the owner of the bonds in question and to be primarily liable thereon, together with said Delphi and after this complainant may be entitled to have a lien upon all property held in her name of Delphi, etc.

After the character of the controversies had been ascertained, they, on August 4, 1923, filed an answer in which they alleged in substance that the bill did not correctly set forth the provisions of the contract of June 20, 1922; that it provided that Delphi would convey the premises involved to Delphi for the sum of $140,000, subject to an unpaid balance of a first mortgage of $147,000, that Delphi would execute a junior mortgage back thereon in the sum of $80,000 and that Delphi would not be the purchaser in the contract for the sum of $28,000; that thereafter the parties to the contract "actually altered it," showing it was agreed that Delphi would assign the junior mortgage bonds in the amount of $28,000 "in full payment of said purchase price;" that thereupon Delphi retained the balance ($28,000) of said bonds, and some of the bonds of said balance were sold, either by him or the Mortgage Co., to any person whomever, that different held the title to the real estate for one A. Coleman, who was the true and actual owner thereof and for whom Delphi acted; that Coleman actually received the said $28,000 worth at par value of said bonds; that at the time of the execution of the contract, and prior to the execution of the $80,000 junior mortgage, the premises were encumbered with another junior lien described in the contract in the sum of $22,000, which lien was to be removed from record and released upon the delivery of said $28,000 worth at par of said junior mortgage bonds to said Delphi; that neither the contract was made nor the junior bond issue created for the purpose of defrauding complainant or any other person; and

that neither at the time the contract was executed nor for a long period thereafter was complainant the owner or in possession of any of said bonds.

And defendants denied that complainant purchased or became the bona fide owner of said junior mortgage bonds, Nos. 1 to 38, inclusive, as alleged; that complainant does not state in her bill, nor do these defendants know, when or from whom she obtained the bonds, and these defendants state the fact to be that she is a mere dummy for said Salzman and is not the bona fide owner or holder of said bonds. And defendants denied that Knight and wife are dummies for the Mortgage Co., or that defendants had engaged in any conspiracy to defraud complainant or the public by causing the property to be placed in the name of Knight. And defendants, while admitting that the first mortgage on the premises was in process of foreclosure, denied that any interest was paid, after such foreclosure proceedings had been commenced, for the purpose of concealing any facts from complainant or for any other improper purpose. And defendants alleged that neither they nor any of them ever had any transactions whatsoever with complainant, or ever made any representations whatsoever to her, or ever had any contractual relations, directly or indirectly or expressly or impliedly, with her.

On the hearing before the master complainant introduced considerable oral and written evidence. She testified in her own behalf and called as witnesses Arthur B. Knight, F. V. Person (president of the Mortgage Co.), and one Eli Metcoff, her brother. On defendants' behalf Person further testified and they called as witnesses Leonard G. Boone, and Joseph B. Lawler, a Chicago attorney, who had as such represented the Mortgage Co. and Knight in the drafting of the contract with Gilbert and in the consummation of the transaction. Other written evidence was introduced by defend-

unts. In the master's report, filed April 24, 1933, his findings of fact, which the court in the decree approved and adopted and restated in 11 paragraphs as material facts of the case, are in substance as follows:

1. That the Mortgage Co., on March 14, 1928, was a duly organized Illinois corporation, with principal place of business in Chicago and engaged in the business of selling real estate bonds and mortgages.

2. That since said date at all times F. V. Person was the president of the Mortgage Co., owned most by all of its capital stock, and controlled and dominated its business affairs.

3. That on said date Arthur B. Knight was, and had been for more than seven years, an employee of the Mortgage Co., and he, as such employee and acting for and on behalf of it, did enter into an agreement with one David Silbert for the purchase of the improved real estate involved (describing it); that the purchase price of the property was $175,000; and that said agreement provided that said purchaser would take the property subject to a then existing mortgage of $147,000.

4. That in said contract it was further provided that the purchaser, Knight, was to execute a junior bond issue in the aggregate sum of $50,000, due on or before 5 years and secured by the trust deed of himself and wife; that the Mortgage Co. was to purchase said bond issue for $28,000; that pending the closing of the deal Knight was to deliver to Silbert his "interim certificate" for the aggregate amount of the bonds to be issued; that among the provisions of the contract was the provision that Silbert, the vendor, was "to deliver said junior bonds, when, as and if executed, to Knight, or his order, in an amount double any and all payments made by or for Silbert on said building, including prepayments on said first mortgage and interest thereon, and including therein taxes and special assessments," etc.; and that it was understood by the parties that after Silbert shall have delivered to Knight bonds in double the amount paid by Knight in and by the pro-rating, "there shall be left with the first party (Silbert), on deposit at all times, an amount in double the amount of the indebtedness," due from Knight to Silbert.

5. That at the time the agreement was executed (March 14, 1928), in addition to the then first mortgage encumbrance on the property of $147,000, there was also a junior lien against the property, to-wit, a trust deed, dated December 15, 1926, and recorded December 21, 1926, made and executed by Jeannette L. Salomon and her husband, conveying said property to a trustee, "to secure the payment of certain notes aggregating $20,000;" that in connection with said agreement to purchase the property for the sum of $175,000, it was understood between the vendor (Silbert) and said Knight, acting for and on behalf of the Mortgage Co. that said vendor, before the delivery of his warranty deed, "was to secure the release of said junior mortgage of $20,000," made by Mrs. Salomon and husband, "by giving to the then holders of the junior mortgage notes, junior bonds to be executed by the purchaser (Knight) of the par value of $20,000."

6. That thereafter, on March 30, 1928, pursuant to said agreement, Knight (the purchaser) took title to the property, and on the same day, with his wife, Mae Knight, executed and delivered their 100 bonds, in the aggregate sum of $50,000, - the same being secured by their trust deed, duly recorded on April 4, 1928.

ants. In the master's report, filed April 26, 1933, his findings of fact, which she says in the decree approved and adopted and embodied in 11 paragraphs as material facts of the cause, are in substance as follows:

1. That the Mortgage (hereinafter called the Mtge. Co.) was a duly organized Illinois corporation with principal place of business in Chicago and engaged in the business of selling real estate loans and mortgages.

2. That prior said date and at all times F. T. Knight was the president of the Mortgage Co., owned most or all of its capital stock, and controlled and dominated its business affairs.

3. That on said date [illegible] Knight was, and had been for more than seven years, an employee of the mortgage Co., and he, as such employee and acting for and on behalf of it, did enter into an agreement with one David Gilbert for the purchase of the improved real estate involved (describing it); that the purchase price of the property was $175,000; and that said agreement provided that said purchaser might take the property subject to a then existing mortgage of $147,000.

4. That it was claimed by the former president that the purchaser, Knight, was to execute a junior bond issue in the aggregate sum of $80,000, due on or before 5 years and secured by the trust deed of himself and wife; that the mortgage Co. was to purchase said bond issue for $80,000 upon the closing of the deal; Knight was to deliver to Gilbert his certificate that the aggregate amount of the bonds is to be $80,000; that among the provisions of the contract was the provision that Gilbert, the vendor, was to deliver said junior bonds, when he had so received, to Knight, or his agent, in an amount double any and all payments made by or for Gilbert on said building, including payments on said first mortgage and interest thereon, and including therein taxes and special assessments"; that, and that it was understood by the parties that after Gilbert shall have delivered to Knight bonds to double the amount paid by Knight in and by the pre-existing, "there shall be left with the third party (Gilbert), on deposit at all times, an amount to double the amount of the indebtedness," due from Knight to Gilbert.

5. That at the time the agreement was executed (March 11, 1929), in addition to the above first mortgage encumbrance on the property of $147,000, there was also a junior lien against the property, to-wit, a trust deed, dated December 13, 1928, and recorded December 21, 1928, made and executed by Jeannette L. Coleman and her husband, conveying said property to a trustee, "to secure the payment of certain notes aggregating $20,000;" that in connection with said agreement to purchase the property for the sum of $175,000, it was understood between the vendor (Gilbert) and said Knight, acting for and on behalf of the Mortgage Co., that said vendor, before the delivery of his warranty deed, "was to secure the release of said junior mortgage of $20,000," made by Mrs. Coleman and husband, "by giving to the then holders of the junior mortgage notes, junior bonds to be executed by the purchaser (Knight) of the par value of $20,000."

6. That thereafter, on March 30, 1929, pursuant to said agreement, Knight (the purchaser) took title to the property; and on the same day, with his wife, Mrs. Knight, executed and delivered their 100 bonds, in the aggregate sum of $80,000, the same being secured by their trust deed, duly recorded on April 4, 1929.

7. That at the said time that Knight and wife executed and delivered said 100 bonds and junior trust deed, Knight "was acting as a dummy" for and in behalf of the Mortgage Co., and said Mortgage Co. "was in fact the real owner of the property;" and that said Knight "not only acted as a dummy in taking title for the Mortgage Co. in connection with the property herein involved, but on a number of occasions, to-wit, seven, prior to March 1, 1926, also took title as a dummy, to other properties purchased for and in behalf of the Mortgage Co."

8. That one Eli Metcoff on May 23, 1927, was engaged in Chicago in the business of a mortgage broker, and as such broker "held as collateral, for a loan, made by him to one A. R. Salzman, 20 principal notes, aggregating $20,000, dated December 15, 1926, signed by said Jeannette L. Salzman and her husband, which notes were secured by a junior trust deed, * * recorded December 21, 1926, being the junior lien existing on the property herein involved at the time of its purchase by said Arthur B. Knight in the manner as hereinabove set forth;" and that said Metcoff, so holding said notes as collateral and after said Knight had taken title to the property herein involved, did, "in lieu and in exchange for said notes, accept $20,000 of the junior gold bonds," executed and delivered by said Knight and wife in the manner hereinabove described.

9. That the complainant herein is a sister of said Eli Metcoff; that she is the owner and legal holder of bonds, Nos. 1 to 20, inclusive, and 23 to 28, inclusive, (36 in all) each for the sum of $500, together with certain unpaid interest coupons thereon due and payable on March 30, 1931, and thereafter; that she purchased said bonds before their maturity from her said brother, Metcoff, who had received them in the manner and for the purpose above mentioned; that the said bonds were not sold to complainant either by the Mortgage Co. or said Person; and that "in purchasing and acquiring said bonds, the complainant did not rely on any representations made by any of the defendants to this cause."

10. That on October 19, 1931, a sale of the property herein involved was had, pursuant to a decree of foreclosure entered in a proceeding seeking a foreclosure of the first mortgage on said property; that at said sale the property was sold for $85,784.68, and there was a resulting deficiency due to the owners of the first mortgage bonds; that said sale did not bring an amount sufficient to pay to complainant any of the money due to her as the owner and holder of said junior mortgage bonds as above mentioned; and that the balance of said junior mortgage bond issue of $50,000, made by said Knight and wife, (to-wit, $22,000 thereof) "was never sold to the public, but was retained by the Mortgage Co., and cancelled."

11. That the Mortgage Co. paid all installments of interest due on said junior bonds owned by the complainant up to March 30, 1931, but the installments maturing on said date were not paid by the Mortgage Co. or by anyone in its behalf, and that as a result of such failure to pay the same the entire principal amount of the outstanding bonds immediately became due and payable in accordance with the provisions of the trust deed, securing them, executed by said Knight and wife as aforesaid.

In the master's report, also, his four conclusions

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

(third to sixth, inclusive), which the court in its decree overruled and made contrary holdings as first above mentioned, are in substance as follows:

Third: That neither the defendant corporation (Mortgage Co.) nor F. V. Person is liable to the complainant for any sum of money whatsoever, nor is complainant entitled to any accounting against the defendants.

Fourth. That complainant is not entitled, as prayed in her bill, to have the Mortgage Co. declared to be the maker of the bonds owned by complainant, and is not entitled to have the Mortgage Co., nor any other defendant herein, "declared to be primarily liable" on said bonds.

Fifth. That the allegations of fraud on the part of defendants, or F. V. Person, as contained in complainant's bill, have not been sustained by the evidence.

Sixth. That the complainant is not entitled to any equitable relief as prayed for in her bill.

It is apparent from the allegations of complainant's bill that fraud and fraudulent misrepresentation on the part of defendants is the gist of her action. And we are of the opinion from a review of the evidence that the findings of fact of the master as contained in the 11 paragraphs of his report, approved and adopted by the court in the decree as correct findings, are amply sustained by the evidence. And we are further of the opinion that the evidence clearly warranted the master's fifth conclusion, overruled by the court in the decree, viz., that the allegations in complainant's bill of fraud on defendants' part have not been sustained. And we are further of the opinion that the contrary holdings of the court, set forth in the decree as first above mentioned, are not justified by the evidence, particularly the holdings that complainant was an <u>innocent</u> purchaser for value of the junior bonds in question, and that she is entitled as damages to a judgment against all defendants in the face amount of said bonds of $18,000, plus unpaid interest to date, or the total amount of $20,122.

Complainant's counsel, in their brief here filed,

attempt to make much of the fact, as evidence of fraud, that the Mortgage Co. was the real purchaser of the property involved in the transaction of March 30, 1928, and that Knight (an employee of the Mortgage Co.), in taking title to the property and in executing and delivering the agreed junior bonds secured by the new junior mortgage in place of the old one, acted as a "dummy" for the Mortgage Co. at its request. But that fact alone does not disclose fraud on the part of the Mortgage Co. and Knight, or render the Mortgage Co. liable to a personal judgment against it on said bonds and mortgage. In the equity case of Shiel v. Chicago Title & Trust Co., 262 Ill. App. 410, 416, it is said:

"It is a frequent practice among business men dealing in real estate, who do not want to involve themselves in personal liability, to employ or utilize some person or persons who will hold the property, execute the notes, trust deeds and mortgages, and thereby relieve themselves of personal liability. It is quite obvious that this is what Walker, Frankle and Behrens attempted to do. They were willing that the land should be subjected to the payment of the debt but they were unwilling to assume any personal obligation. Hence they used the name of Signa M. Johnson as a means to accomplish their purpose and we see nothing improper in such conduct.

As an elementary proposition a suit at law could not have been maintained upon the note in controversy against Walker, Frankle and Behrens because section 18 of the Uniform Negotiable Instruments Act, Cahill's Stat. Ch. 98, Par. 38 (providing that 'No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided') forbids it, and we know of no rule of law that will subject them to personal liability on a note unless they had expressly or impliedly agreed to pay it. There seems to be no such agreement in this case, and we therefore conclude that the decree is erroneous in so far as it rendered a personal judgment for the deficiency, and to that extent the decree is reversed and the cause remanded."

In State v. Reynolds, 245 S. W. Rep. (Mo. Sup. Ct.) 1065, the court, adopting an opinion of the court of appeals of Missouri, said in part (p. 1066):

"It is argued by respondents that appellants caused this straw-man note to be made and placed upon the commercial world. Even if they did, their object and purpose in doing so was clearly evident, and was done in order to avoid any personal liability, and their reasons for doing so were legitimate and proper."

As to the court adjudging in the decree that complainant

is entitled in this equity proceeding to a personal judgment for $20,122, against all three defendants, we are of the opinion that under the evidence it cannot be sanctioned by law or practice. We think that the master was correct in his sixth conclusion, as contained in his report, viz, "that the complainant is not entitled to any equitable relief as prayed for in her bill." And we think that any remedy that complainant may have as holder of the junior bonds in question is an action at law against Knight and wife, the makers of said bonds. And it appears to us that what is said in Lowell v. Mitchell, 106 U. S. 430, 432, (quoted in Hogg v. Hohmann, 330 Ill. 589, 595) is here particularly applicable, viz,

> "The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice."

Our conclusion is that the decree appealed from should be reversed and the cause remanded with directions to the superior court to dismiss complainant's bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

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36535

JACK PERSKY,
Plaintiff in Error,

v.

GREAT NORTHERN FINANCE COMPANY,
a corporation,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

272 I.A. 604

MR. JUSTICE SHIELDS DELIVERED THE OPINION OF THE COURT.

On October 21, 1932, plaintiff commenced an action in replevin to recover the possession of an automobile, valued at $350. He alleged in the affidavit that he was the owner of the car and lawfully entitled to its possession, and that on October 17th, defendant wrongfully took and wrongfully detains it. On October 24th, the bailiff, finding the car in defendant's possession, replevied it under the writ and turned it over to plaintiff. On December 10, 1932, the cause was tried without a jury, resulting in the court finding the right of property in defendant and adjudging that defendant recover the possession of the car from plaintiff and that a writ of retorno habendo issue, etc. It is sought by the present writ of error to reverse the judgment.

On the trial plaintiff testified as a witness in his own behalf and he called two witnesses, viz., Vanderf Gray, president of defendant, and Frank E. Shapiro, president of the Advance Finance Corporation and, individually, a broker, licensed to negotiate loans, etc. Plaintiff also introduced in evidence his written application for a loan of $300, to be secured by a chattel mortgage on the car in question; a chattel mortgage note signed by him and dated July 12, 1932; and a chattel mortgage, executed by him on the same date, conveying the car to the Advance Finance Corporation, which mortgage

[illegible]

[illegible]

[illegible] Plaintiff in error,

v.

[illegible] FINANCE CORPORATION,
a corporation,
Defendant in error.

[illegible] TO [illegible]
COURT OF [illegible].

[illegible] FURTHER WITHOUT [illegible] THE OPINION OF THE COURT.

On October 22, 1931, plaintiff recovered a action to replevin to recover the possession of an automobile, valued at $250. He alleges in the affidavit that he was the owner of the car and lawfully entitled to its possession, and that on October 17th, defendant wrongfully took and detained it. On October 21st, the bailiff, finding the car in defendant's possession, replevied it under the writ and turned it over to plaintiff. On trial, the issue was taken without a jury, resulting in the court finding the rights of possession in defendant and adjudging that defendant recover the possession of the car from plaintiff and that a writ of retorno habendo issue, etc. It is sought by the present writ of error to reverse the judgment.

On the trial plaintiff testified as a witness in his own behalf and he called two witnesses, viz., Tanner Gray, president of defendant, and Frank E. Hopkins, president of the Avenue Finance Corporation and, incidentally, a broker, licensed to negotiate loans, etc. Plaintiff also introduced in evidence his written application for a loan of $250, to be secured by a mortgage on the car in question; a chattel mortgage made thereon by him and dated July 12, 1931; and a chattel mortgage, executed by him on the same date, covering the car to the Avenue Finance Corporation, which mortgage

immediately after its execution and delivery was by written assignment of the mortgagee assigned and delivered to defendant (Great Northern Finance Co.) The mortgage, bearing such assignment, was duly recorded in the recorder's office of Cook County on July 18, 1932. No evidence was introduced by defendant.

The written application for the loan is on a printed form, with the blanks filled out in ink. It is headed "Confidential Credit Information to _____, Broker." The amount of the loan applied for is $300; the "brokerage" is stated to be $77.50 and the amount of the mortgage $377.50; and the described automobile is the car in question. Following the filled in blanks and immediately above plaintiff's signature are the following statements:

> "I hereby certify the above statements to be true and correct and given for the purpose of inducing you to obtain credit for me. I hereby authorize you to act as my agent to sell my note in the amount of $377.50.
>
> As security for said note I hereby agree to execute and deliver a chattel mortgage on the automobile herein described, and I agree to pay you the sum of $77.50 as commission for your services."

By the chattel mortgage note, signed and indorsed in blank by plaintiff, he promised to pay to the order of himself $377.50, "due in installments as follows: $31.45 on August 12, 1932, and at least $31.45 on the 12th day of each consecutive month for ten months, and $31.55 on the twelfth month, at the office of Great Northern Finance Co., * * Chicago, * * with interest at the rate of 7 per cent. per annum from date until maturity, payable monthly on the unpaid balance; after maturity at the highest legal rate." It is also provided in the note that if any installment thereof is not paid when due, "the entire amount unpaid shall be due and payable forthwith at the election of the holder of the note without notice." The chattel mortgage is in the usual form, describes the note and the mortgaged automobile, and contains the usual provisions.

immediately after its execution and delivery was by written assignment of the mortgage assigned and delivered to defendant Lyman Northrup Finance Co.) The mortgage, bearing such assignment, was duly recorded in the recorder's office of Cook County on July 26, 1922. No evidence was introduced by defendant.

The written application for the loan is on a printed form, with the blanks filled out in ink. It is headed "Confidential Credit Information to _____, Trustee." The amount of the loan applied for in 1922; the "proceeds" is stated to be $77.00 and the amount of the mortgage $77.00; and the described automobile is the sole security. Following the blanks and immediately above plaintiff's signature are the following statements:

"I hereby certify the above statements to be true and correct and given for the purpose of inducing you to obtain credit for me. I hereby authorize you to act as my agent to sell my note in the amount of $77.00.

As security for said note I hereby agree to execute and deliver a chattel mortgage on the automobile herein described, and I agree to pay the sum of $77.00 as specified for every month."

By the chattel mortgage note, signed and interned in blank by plaintiff, he promised to pay to the order of himself $77.00, "due in installments as follows: $22.00 on August 22, 1922, and at least $22.00 on the 22d day of each consecutive month for two months, and $22.00 on the twelfth month, at the office of Lyman Northrup Finance Co., * * Chicago, I." with interest at the rate of 7 per cent, per annum from date until maturity, payable monthly on the unpaid balance after maturity at the highest legal rate." It is also provided in the note that if any installment thereof is not paid when due, "the entire amount unpaid shall be due and payable forthwith at the election of the holder of the note without notice." The chattel mortgage is in the usual form, describes the note and the mortgaged automobile, and contains the usual provisions.

It appears from the evidence in substance that during July, 1932, plaintiff applied to Shapiro for a loan of $300, to be secured by his note and chattel mortgage on the car; that after investigation Shapiro agreed to get the loan on such security; that the transaction was consummated on July 12th; that on that day plaintiff received a check of the Advance Finance Corporation, which he subsequently cashed; that plaintiff failed to pay the installment of $31.45, due on the note on October 12th; that defendant, as assignee of the mortgage, elected to declare the entire indebtedness due, and seized and took possession of the car for the purpose of selling it and realizing on the balance of the unpaid indebtedness; and that shortly thereafter plaintiff instituted the present replevin proceedings and thereby obtained possession of the car. It further appears from the testimony of Shapiro in substance that he is and was a "licensed broker," having "a license to make loans and charge for my services;" that the loan of $300 was made to plaintiff on the strength of his statements contained in the application; that he (Shapiro) personally acted as plaintiff's broker in the transaction; that the $77.50, agreed to be paid by plaintiff in his application as a "commission," was his (Shapiro's) charge, or "brokerage fee," for procuring the loan; and that at the time it was consummated, and the chattel mortgage assigned to defendant (Great Northern Finance Co.), he (Shapiro) "got $323.50" from defendant.

During the trial plaintiff's counsel contended in substance, as they here contend, that the evidence discloses that the transaction is so tainted with usury that, under the provisions of section 2 of Small Loans Act (Cahill's Stat. 1931, Chap. 74, p. 1732), plaintiff's note and chattel mortgage are void, and plaintiff can recover back in the present action the possession of the automobile, free and

clear of any lien of the mortgage. After reviewing the evidence, and considering particularly the provisions of plaintiff's application for the loan, we cannot agree with the contention. The burden of clearly proving the claimed usury rested upon plaintiff and we do not think he sufficiently sustained that burden. In Kihlholz v. Wolf, 103 Ill. 362, 366, it is said: "The law is, the burden of proving a transaction usurious rests upon the party alleging it. This he must do by a preponderance of the evidence, or else the defense fails." (See, also, Telford v. Garrels, 132 Ill. 550, 554; Gantzer v. Schmeltz, 206 Ill. 560, 563; Firebaugh v. Teegren, 265 Ill. App. 381, 386.) And we do not think that the mere fact that it appears that Shapiro was the president of the Advance Finance Corporation at the time the loan to plaintiff was consummated discloses that the transaction was usurious. (See Chicago Fire Proofing Co. v. Park National Bank, 145 Ill. 481, 485-6.)

We are of the opinion that the trial court's finding and judgment are warranted by the evidence. Accordingly, the judgment of December 19, 1932, in question, is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

clear of any lien of the mortgage. After reviewing the evidence, and considering particularly the propriety of plaintiff's application for the lien, we cannot agree with the contention. The burden of clearly proving the claimed money paid upon plaintiff was on us and cannot be sufficiently overcome that burden. In Gibbons v. Tuft, 108 Ill. App. 280, 283, it is said: "The law is, the burden of proving a transaction usurious rests upon the party alleging it. This he must do by a preponderance of the evidence, or else the defense fails." (See also, Indiana v. Daniels, 236 Ill. 600, 604; Gerner v. Schmidt, 264 Ill. 94, 98; Fitzhugh v. Jenkins, 248 Ill. 328.) And we do not think that the mere fact that it appears that Shipke was the president of the Savoye Finance Corporation at the time the loan in plaintiff was consummated physically took the transaction out usurious. (See Chicago Ind. Trust Co. v. Ind. Building Corp., 341 Ill. 441, 444.)

We are of the opinion that the trial court's finding and judgment are warranted by the evidence. Accordingly, the judgment of December 19, 1952, in question, is affirmed.

AFFIRMED.

Gulliver, P. J., and Wenzlick, J., concur.

15 A

36579

RUTH V. JENNINGS, Appellee, v. NATALIE ASHMENCKAS, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

272 I.A. 604

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff on the evening of March 30, 1931, occasioned by the collision of the automobile which she was driving with another automobile driven by defendant, in the intersection of Leavitt street and Leland avenue, Chicago, there was a trial before a jury in October, 1932, resulting in a verdict finding defendant guilty and assessing plaintiff's damages at $3000. On December 2, 1932, judgment was entered on the verdict against defendant and she prosecutes the present appeal.

Plaintiff's declaration consisted of three counts, to which defendant filed a plea of the general issue. In the first count plaintiff averred in substance that on the evening of March 30, 1931, after dark, she was driving her automobile in a northerly direction in Leavitt street to and across the intersection of that street with Leland avenue, Chicago, and was at all times in the exercise of due care for her own safety; that defendant was driving her automobile in a westerly direction in Leland avenue; and that defendant so carelessly and negligently drove her automobile that it violently ran into plaintiff's automobile, whereby plaintiff was thrown out of it and upon the ground and was severely and

permanently injured. In the second count the negligence charged against defendant was that of propelling her car at the time at an excessive and dangerous rate of speed in a closely built-up, residential portion of the city. In the third count defendant is charged with willful and wanton negligence in the driving of her car. During the trial by agreement the third count was withdrawn from the jury's consideration.

Two contentions are here made by counsel for defendant, viz., (1) that the jury's verdict is manifestly against the weight of the evidence on the questions of defendant's negligence and plaintiff's contributory negligence, and (2) that the evidence shows such contributory negligence on plaintiff's part as warrants a reversal of the judgment without remanding. We find no merit in either contention. On both issues the evidence was conflicting. After carefully reviewing the testimony of the various witnesses and certain physical facts as testified to by some of them, and considering certain photographs of the place of the accident and of the two automobiles taken separately after the accident, we find in substance the following facts disclosed:

The collision occurred about 10:30 p. m. in the northeast portion of the intersection. Plaintiff, driving a Ford sedan at a moderate rate of speed northerly on the east side of Leavitt street, approached the intersection, looked for cars coming from the east on Leland avenue, and not seeing any proceeded on to cross the intersection. When plaintiff had about reached the center of Leland avenue in the intersection defendant, driving her larger and heavier Chevrolet sedan at a very rapid and excessive rate of speed westerly on the north side of Leland avenue, suddenly approached the intersection, entered it, made unsuccessful efforts to stop her car, and crashed into the front right side of plaintiff's car, which at the

personally injured. In the second count the negligence charged against defendant was that of propelling her car at the time at an excessive and dangerous rate of speed in a densely well-populated portion of the city. In the third count defendant is charged with willful and wanton negligence in the driving of her car, during the trial by agreement the third count was withdrawn from the jury's consideration.

The conclusions are here duly by counsel for defendant, viz., (1) that the jury's verdict is manifestly against the weight of the evidence on the questions of defendant's negligence and plaintiff's contributory negligence, and (2) that the evidence shows such contributory negligence on plaintiff's part as warrants a reversal of the judgment without remanding. We find no merit in either contention. On both issues the evidence was conflicting. After carefully reviewing the testimony of the various witnesses and certain physical facts as certified to by some of them, and considering certain photographs of the place of the accident and of the two automobiles taken separately after the accident, we find in substance the following facts disclosed:

The collision occurred about 10:30 p. m. in the northbound portion of the intersection. Plaintiff, driving a Ford sedan at a moderate rate of speed northwardly on the east side of Lavitt street, approached the intersection, looked for cars coming from the east on Leland avenue, and not seeing any proceeded on to cross the intersection. When plaintiff had about reached the center of Leland avenue in the intersection defendant, driving her larger and heavier Chevrolet sedan at a very high and excessive rate of speed westwardly on the north side of Leland avenue, suddenly approached the intersection, entered it, made unsuccessful efforts to stop her car, and crashed into the front right side of plaintiff's car, which at the

time had its headlight burning. Plaintiff's car was spun around, thrown toward the west and caused to be upset, and it finally came to a stop, lying on its right side, on the north curb of Leland avenue just west of the west curb line of Leavitt street. Plaintiff was thrown out of the door of the car and upon the street and suffered the injuries complained of. Defendant's car continued on its wheels in a northwesterly direction until it came to a stop across the west curb line of Leavitt street, against an iron railing, north of Leland avenue.

We are of the opinion that under the facts the questions of the negligence of defendant and the contributory negligence of plaintiff, if any, were for the jury to determine. It is argued in substance by defendant's counsel that, as defendant's car approached the intersection from plaintiff's right, it had the right of way under the statute, and plaintiff should have seen defendant's car approaching from the right and stopped her car and allowed defendant's car to cross the intersection in front of plaintiff's car. We find no merit in the argument. Plaintiff's car entered the intersection first, and at a time when defendant's car, considering its very excessive speed, was a considerable distance east of the intersection. And defendant should have seen plaintiff's car in time to have stopped, and should have had her car under such control as to have enabled her to do so. In Salmon v. Wilson, 227 Ill. App. 286, 288, it is said:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection." (See, also, Darling & Co. v. Yellow Cab Co., 238 Ill. App. 326, 329; Heidler, etc. Co. v. Wilson, etc. Co., 243 Ill. App. 89, 94-5.)

take but six months longer. Plaintiff's car was upon crossing, thereon having the real and exclusive to be sure, and if Plaintiff were to a stop, lying on its right side, on the north side of Lakeland avenue just west of the west curb line of Lawrence street. Plaintiff was thrown out of the rear of the car and upon the street and suffered the injuries complained of. Defendant's car continued on its course in a northwesterly direction until it came to a stop across the east curb line of Lawrence street, against an iron railing north of Lakeland avenue.

To any of the opinions that make the trite the questions of the negligence of defendant and the contributory negligence of plaintiff, if any, rule for the jury in federalism. It is argued in substance by defendant's counsel that, as defendant's car crossed the intersection from Plaintiff's right, it had the right of way under the statute, and Plaintiff should have given defendant's car approaching from the right and stopped her car and allowed defendant's car to cross the intersection in front of plaintiff's car. We find no merit in the argument. Plaintiff's car entered the intersection first, and at a time when defendant's car, considering the very excessive speed, was a considerable distance east of the intersection. And defendant should have seen plaintiff's car in time to have stopped, and should have had her car under such control as to have enabled her to do so. In Delong v. Illinois, 227 Ill. App. 288, 289, it is said:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer this right regardless of the circumstances, and may be lost by the operator of the vehicle on the approaching from the right if he has reasonable time to avoid the collision by the exercise of ordinary care. It does not contemplate that the right of intersection. It does not contemplate that the right may be lawfully done the one from the right in so far from the intersection at the time the car first comes in sight within a reasonable distance of speed, the driver will reach the line of crossing before the former will reach the intersection." (See, also, Delline v. Ry. v. Pullman Car Co., 228 Ill. App. 84, 87; Pfeifer, etc. Co. v. Illinois, etc., 243 Ill. App. 87, 92-3.)

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

16 H

36588

JENNIE BORNHOLDER,
Appellee,

v.

GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

272 I.A. 604

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against it for $1000, rendered by the superior court of Cook county, upon the verdict of a jury, on December 10, 1932. Plaintiff's action was for damages for personal injuries received on the morning of July 29, 1930, while she was making certain purchases in defendant's store at No. 4251 West Madison street, Chicago.

Plaintiff's amended declaration consisted of three counts. In the first she alleged in substance that on the day mentioned and prior thereto defendant was conducting its said store for the sale of groceries, etc., to its customers and the public generally; that defendant had invited plaintiff and the public to come to the store and make purchases; that on the day mentioned, while plaintiff was in the store and making purchases, defendant negligently caused a portion of the floor of the store to be and remain in a slippery condition; that by reason thereof, while plaintiff was using all due care and caution for her own safety, she suddenly slipped and was thrown violently upon the floor and suffered a severe injury to one of her limbs, causing her great pain and also damage in the expenditure of moneys in

the endeavor to be cured, and in being prevented from carrying on her usual duties in earning a livelihood. In the second count the charge is similar though in somewhat different language. In the third the charge is defendant's negligent failure to keep its store in a reasonably safe condition for customers when being therein.

After defendant's demurrer to the several counts had been overruled, it filed a plea of the general issue to the declaration.

On the trial plaintiff was her only witness as to the details of the accident. She also testified to the extent of her injuries, her pain and suffering and the pecuniary damages she had suffered in expenditures for medicines and physician's services, and also to her business, which was that of keeping a rooming and boarding house. As to her injuries she called as witnesses her daughter, Minnie Boekholder, and her attending physician, Dr. Clarence O. Haley. The testimony of the physician was to the effect that she had a severely sprained left ankle; that there was no evidence of a fracture of any bone; that she had suffered much pain; that he had treated her on numerous occasions from the date of the accident, July 29, 1930, until September 16, 1930; and that her injuries were such as to materially interfere with the carrying on of her business during that period. Defendant's two witnesses were Edward F. Rothert, manager of the store, and Victor E. Rolf, a clerk in the store. Neither actually saw plaintiff fall upon the floor, but did see her shortly thereafter. The testimony was conflicting on the question whether or not there was oil on the floor, rendering it slippery, at the time and place of plaintiff's fall.

the defendant is by law, and is being prevented from enjoying an her normal status in running a livelihood. In the second count the charge is similar though in another different language. In the third count it charges the defendant's negligent failure to keep the store in a reasonably safe condition for customers when being invited.

After defendant's demurrer to the several counts had been overruled, it filed a plea of the general issue to the declaration.

On the trial plaintiff was her only witness as to the details of the accident. The plan testified to the extent of her injuries, her pain and suffering and her permanent damage she had suffered in expenditures for medicines and physicians' services, and also to her business, which was that of keeping a rooming and boarding house. As to her injuries she called as witnesses her daughter, Minnie Hawkinson, and her attending physician, Dr. Clarence O. Daly. The testimony of the physician was to the effect that he had a recently graduated from medical school, that he had treated her on numerous occasions from the date of her accident, July 6, 1930, until December 16, 1931; and that her injuries were such as to materially interfere with the carrying on of her business during that period. Defendant's two witnesses were Edward J. Dobbins, manager of the store, and Vivian J. Hall, a clerk in the store. Neither actually saw plaintiff fall upon the floor, but did see her shortly thereafter. The testimony was conflicting on the question whether or not there was oil on the floor, considering its quantity, at the time and place of plaintiff's fall.

The main contention of defendant's counsel is that the verdict, on the questions of defendant's negligence and plaintiff's contributory negligence, is manifestly against the weight of the evidence. We cannot agree with the contention. The evidence on these two questions was conflicting, and it was the province of the jury to determine them. No useful purpose will be served in outlining the conflicting testimony. Suffice it to say that in our opinion the evidence was such as would warrant a jury in returning a verdict for plaintiff. The case is quite similar in its facts to that of Shea v. National Tea Co., 267 Ill. App. 622, decided by this appellate court on October 4, 1932, No. 35927. What we said in the unpublished opinion is here applicable, viz., "The main contention of defendant's counsel is that the verdict is against the manifest weight of the evidence on the question of defendant's liability to plaintiff. * * We are of the opinion that the entire evidence sufficiently discloses that defendant was guilty of the negligence charged, rendering it liable to respond in damages to plaintiff, an invitee upon its premises, in the amount as fixed by the jury. (Citing Faucknor v. Yokem, 231 Ill. 278, 279; Purtell v. Philadelphia Coal Co., 256 id. 110, 114; McNeil v. William G. Brown & Co., 22 Fed., 2nd, 675; Isaac Benesch & Sons v. Perkler, 153 Md. 680, 683.)" The same cases may appropriately be cited as here applicable.

Defendant's counsel also contend that the amount of the verdict and judgment in the present case, $1000, is grossly excessive. After carefully considering all of the evidence we are unable to say that the jury's verdict, sustained by the court, is so excessive as to warrant a remittitur here being ordered in any amount.

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

The main contention of defendant's counsel is that the verdict, on the questions of defendant's negligence and plaintiff's contributory negligence, is manifestly against the weight of the evidence. We cannot agree with the contention. The evidence on these two questions was conflicting, and it was the province of the jury to determine them. The useful purpose will be served in qualifying the conflicting testimony. Suffice it to say that in our opinion the evidence was such as would warrant a jury in returning a verdict for plaintiff. The case is quite similar in its facts to that of Chen v. Stillwell Tan Co., 207 Ill. App. 481, written by this appellate court on October 4, 1920, No. 18027. Thus we said in the unpublished opinion in that cognicable, viz., "The main contention of defendant's counsel is that the verdict is against the manifest weight of the evidence on the question of defendant's liability to plaintiff. * * * We are of the opinion that the entire evidence satisfactorily shows that defendant was guilty of the negligence as alleged, proximate if liable to damage to plaintiff, an issue upon the pleadings, in the course as tried by the jury. (citing Chicago v. Kiley, 201 Ill. 270, citing Chicago v. Philadelphia Coal Co., 200 id. 112; Illi Central v. Siling, 2 Ill. App. 32 (1878), 104, 107; Lake Shore & Chic R. Co. v. Dwyer, 126 id. 225.)" The same cases may appropriately be cited as here applicable.

Defendant's counsel also contend that the amount of the verdict and judgment in the instant case, $1500, is grossly excessive. We certainly cannot disturb all of the evidence we can gather so only that the jury's verdict, rendered by the court, is so excessive as to warrant a reviewing court being interest in any manner.

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Gallison, P. J. and Jacobs, J., concur.

36600

WILLIAM NOBB, administrator of estate of John Nobb, deceased, Appellee,

v.

ELIZE A. LEITCH, doing business as West Suburban Realty Company, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 604

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a judgment for $637, rendered against defendant on November 15, 1932, in a 4th class action in contract, following a trial without a jury.

It appears from the record that on the day the judgment was rendered, the court allowed an appeal by defendant to this appellate court, conditioned upon her filing within 30 days an appeal bond in the sum of $1400, and also allowed defendant 60 days within which to file a bill of exceptions, and that within the 30 days defendant presented her bond and the same was approved and filed. But the transcript does not disclose that a proper bill of exceptions, duly certified to under the signature and seal of the trial judge, was filed at any time. It does disclose that on January 12, 1933 (within said 60 days), defendant presented a purported bill of exceptions which the judge refused to approve, and gave defendant further time to file a proper bill; that on February 7, 1933, defendant's motion that her amended bill of exceptions then presented be approved was denied; and that notwithstanding the denial defendant, on February 7, 1933, filed an instrument, labelled "Bill of Exceptions," in the clerk's office, but the same does not bear the trial judge's certificate as to its

correctness. In other words, there is no proper bill of exceptions contained in the present transcript.

The issues as disclosed from plaintiff's statement of claim, filed July 14, 1932, and from defendant's amended affidavit of merits, filed August 24, 1932, are in substance as follows: Plaintiff claimed that after the death of plaintiff's intestate, to-wit, on January 28, 1932, defendant promised in writing to pay to plaintiff, as administrator, her certain note upon which there was then due for money loaned the sum of $879; that thereafter defendant paid to plaintiff the sum of $260 on the note, leaving a balance due of $619, and interest; and that defendant is indebted to plaintiff in the sum of $657, including interest. Defendant on the other hand claimed that about April 21, 1918, she indorsed a note as surety for her sister, Dollie F. Leitch, the maker, and which note was delivered to John A. Robb in his lifetime; that the note is barred by the Statute of Limitations; and that she is "not aware" of ever having given a new note or any other instrument in writing to plaintiff, promising to pay the indebtedness as evidenced by the original note. She also claimed that the indebtedness as evidenced by the original note had been paid in full and that she was not indebted to plaintiff in any sum.

Inasmuch as the present record discloses that a trial of the issues as framed was had before the court without a jury in November, 1932, at which evidence was introduced by both parties, it must be presumed, in the absence of any bill of exceptions properly certified by the trial judge, that the evidence was sufficient to support the finding and judgment of the court. (In re Estate of Martha Janetti, deceased, 190 Ill. App. 13, 14; Sunger v. Pfeiffer, 197 id. 190, 191; Tibbitts-Hewitt Co. v. Cohen, 256

[illegible] [illegible] [illegible] [

id. 459, 461.) After the record in the present case had here been filed plaintiff made a written motion, accompanied by suggestions, that the judgment of the municipal court be affirmed for various reasons with statutory damages. The motion was reserved to the hearing and will now be denied.

For the reasons indicated the judgment of the municipal court of November 15, 1932, is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

18 7

36782

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, a corporation, Complainant and Appellee, v. JOHN W. KEOGH and ROBERT B. PECK, Defendants.	APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF COOK COUNTY APPOINTING A RECEIVER.
ON THE APPEAL OF JOHN W. KEOGH, Appellant.	272 I.A. 604

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by John W. Keogh, under the provisions of section 123 of the Practice Act, from the order of the superior court of Cook county, entered in a foreclosure proceeding on March 23, 1933, appointing Adam J. Lang as receiver of the improved premises involved, situated at the southeast corner of Ohio and Pine Streets, Chicago.

In complainants' verified bill, filed December 20, 1932, there is the usual prayer for a foreclosure and the appointment of a receiver pendente lite to take charge of the premises and collect the rents, etc. Some of the allegations of the bill are in substance:

That on December 3, 1925, John W. Keogh, a widower, being indebted to complainant in the sum of $250,000, executed and delivered his principal promissory note in that sum, dated December 3, 1925, and payable to complainants' order on December 15, 1930, with interest at the rate of 5 per cent per annum, as evidenced by eleven interest notes or coupons of even date therewith, - the first being for $1,597.20, payable on February 1, 1926, and nine (9) being for $6,250 each, payable respectively at successive half-yearly periods thereafter, and one (1) being for $4,652.80, payable on December 15, 1930, all of the notes bearing interest at the rate of 7 per cent per annum after maturity; that to secure the notes Keogh executed and delivered his certain mortgage, dated the same day and recorded on December 23, 1925, whereby he conveyed and warranted to complainant the premises and all buildings and improvements then or thereafter located thereon

(copies of the notes and the mortgage are attached to the bill as exhibits); that in the mortgage he also conveyed to complainants the rents, issues and profits of the premises; that it was provided in the mortgage that, in case of default in the payment of said note or coupons or any of them, or in case of non-payment of taxes or assessments, or in case of neglect to maintain or renew insurance on the premises, or in case of breach of any of the covenants in the mortgage, then the whole of the unmatured indebtedness should at once (at the option of the legal holder and without notice) become due and payable, and that any court of competent jurisdiction might appoint a receiver, with usual powers, to take possession and control of the premises, and lease the same, and collect and receive the rents, and apply the same to the payment of the indebtedness; that it was also provided in the mortgage that the maker should pay all taxes and assessments on the premises and should keep the buildings insured, etc.; that it was also provided in the mortgage that, upon the filing of any bill to foreclose the same, the court might appoint any proper person as receiver, with power to collect the rents, etc., arising out of the premises during the pendency of the foreclosure suit, and afterwards until the time to redeem the same from any sale should have expired; and that all such rents, etc., when collected, might be applied towards the payment of the indebtedness, costs, etc.

That complainant is now and has been since its execution the legal owner and holder of the principal note; that on or about November 19, 1930, complainant and Keogh entered into a written agreement (recorded December 3, 1930) whereby the payment of said note was extended to December 15, 1933, with interest for the three years at the rate of 5-1/2 per cent per annum; that concurrently with the execution of said agreement (attached as an exhibit to and made a part of the bill), Keogh executed and delivered to complainant his seven interest coupon notes, - one being for $1,756.99, due on February 1, 1931, and five being each for $6,875, payable at successive half-yearly periods thereafter on August 1, and February 1, in each year, and the last coupon note for $5,118.01, payable on December 15, 1933; and that by the agreement it was provided that Keogh would pay said principal note on December 15, 1933, together with the interest thereon as evidenced by said seven interest coupon notes, and that all of the stipulations and covenants in the principal note and mortgage should remain in full force and effect for and during the extended period, including the right of the holder of the principal note to make the principal due on default of payment of said interest.

That all of the original interest coupon notes have been paid and cancelled; that the new interest coupon note for $1,756.99 has been paid and cancelled; that the new interest coupon note for $6,875, due on August 1, 1931, has likewise been paid and cancelled; that default has been made in the payment of the new interest coupon notes, each for $6,875 and due respectively on February 1, 1932, and August 1, 1932; that complainant, by reason of said defaults and in accordance with the authority contained in the original mortgage and in the extension agreement, has elected and does hereby elect to declare the entire unpaid principal sum of $250,000 to be immediately due and payable; that there is now due to it said principal sum, together with the past due interest mentioned; that the premises have become forfeited, subject to redemption in equity; and that Keogh is the owner of the equity of redemption.

That the premises are improved with a two-story brick building; that there is unpaid on the 1928 general taxes approximately $5,000, and on the 1929 general taxes approximately $6,000; and on the 1930 general taxes approximately $12,477.73; that in addition thereto the 1931 taxes are now a lien on the premises; that there is pending in the superior court a cause entitled "People, etc. v. Keogh," No. 563,599, wherein it is sought to foreclose the lien of the unpaid taxes; that the premises "are scant security for complainants' indebtedness, and at a fair appraised value are worth less than the amount of the indebtedness under the mortgage and the aforesaid taxes;" that complainant's security "will be endangered and seriously impaired unless a receiver is appointed pendente lite to take charge of the premises and to collect the rents;" and that defendant, Robert B. Peck, has or claims to have some interest or title in the premises, but that the same, if any, is subordinate to the right and interest of complainant.

On February 24, 1933, Keogh, having previously been served with process, filed his answer, pro se, to the bill. On the same day complainant's motion (after due notice to Keogh) for the appointment of a receiver, pendente lite, upon bill and answer, was set for hearing on March 3, 1933. In Keogh's answer, he admitted the execution and delivery to complainant of the principal note for $250,000, the mortgage, the mentioned interest coupon notes and the extension agreement. He also admitted that the principal note was unpaid, as were also unpaid the mentioned interest coupon notes due, respectively, on February 1, 1933, and August 1, 1932; that he was the owner of the equity of redemption; and that the general taxes levied on the premises for the years 1928, 1929 and 1930 had not been paid. He denied that the general 1931 taxes were a lien upon the premises, but admitted that there was pending in the superior court cause No. 563, 599, wherein the People were seeking to foreclose the lien for the unpaid taxes. He denied that the premises are scant security for the indebtedness due to complainant, or that at a fair appraised value they are worth less than the amount of said indebtedness, plus the unpaid taxes, and alleged that the fair value of the premises was in excess of $300,000. He denied that, if a receiver was not appointed pendente lite, complainant's rights or security would be endangered or seriously impaired. He further alleged in

substance: That complainant is "without right, power or authority" to file its bill for a foreclosure and that the superior court "is without jurisdiction to entertain the bill" for the following reasons:

"That under the Constitution and Statutes of the State of Illinois the defendant, in matters involving the right, title and interest to freehold and involving the issues as here joined, has a right of appeal to a legally constituted and a de jure Supreme Court of the State; that there is no de jure Supreme Court of the State; that the general real estate taxes, levied and assessed against the premises, are illegal and null and void by reason of the fact that said levy and assessment are in violation of Article IX, section 9 of the Constitution of this State; that said Supreme Court is not a de jure Supreme Court by reason of the fact that Article VI, sections 2, 3 and 5, and Article IV, sections 6, 7 and 8, of the Constitution of this State have been violated, and by reason of the fact that the people of this State, and this defendant, have been deprived of a Republican form of government, and that the Government of the United States has failed to perform the guaranty contained in Article IV, section 4, of the Constitution of the United States."

On March 3, 1933, there was a hearing before the Chancellor on complainant's motion for the appointment of a receiver, at which Keogh was present, resulting in the court ordering that Joseph [illegible]. Cremin be appointed as receiver of the premises with usual powers, conditional upon complainant giving its bond in the sum of $1,000, and the receiver a receiver's bond in the sum of $20,000, to be presented and approved within 10 days. In the order the court found inter alia that in the mortgage sought to be foreclosed it is stated that the rents, issues and profits of the premises are expressly pledged as additional security for the indebtedness and that upon the filing of a bill for foreclosure the court may appoint any proper person as receiver to collect the rents, etc., during the pendency of the foreclosure suit; that it appears that the premises are scant and insufficient security for the payment of the indebtedness, and that the court is of the opinion that a receiver pendente lite should be appointed as prayed. The present record discloses that Cremin declined to act as receiver, or to qualify as such by the filing of the required bond.

subpoenas. Such complainant is "without right, power or authority" to file the bill for a foreclosure and then the superior court "is without jurisdiction to entertain the bill" for the foreclosure proceeding.

"Then under the provisions and purposes of the State of Illinois the mortgage, in seeking foreclosure the right, and insofar as foreclosure and involving the issues of here, has a right of appeal to a legally constituted and a court of superior court of the county that which is to be the superior court of the State; that the property that which being located and mortgage the property, the legal and substantial are in violation of section 3, of the constitution of this State; that said foreclosure is not a de jure proceeding insofar as issues of the State that violate VI, sections 2, 3 and 5, and violate IV, sections 2, 7 and 8, of the Constitution of the United States have been violated, and by reason of the fact that the people of this State and this Territory have been deprived of a fundamental form of government, and that the Government of the United States has failed to secure to them the guarantee contained in article IV, section 4, of the Constitution of the United States."

On March 2, 1933, there was a hearing before the Chancellor on complainant's motion for the appointment of a receiver, at which Kemp was present, resulting in the court entering that Judge's Decree by appointing a receiver of the premises with usual powers, conditioned upon complainant giving his bond in the sum of $2,000, and the receiver's certificate bond in the sum of $20,000, to be presented and approved within 10 days. In the order the court found (this also that in the mortgage provision to be foreclosed it is stated that the parties, issues and problem of the premises are expressly pledged as additional security for the indebtedness and that upon the filing of a bill for foreclosure the court may appoint any proper person as receiver to manage the premises, and, during the pendency of the foreclosure only that it appears that the premises are worth and sufficient security for the payment of the indebtedness, and that the court is of the opinion that a receiver possible fitness should be appointed as prayed. The present record disclosed that Kemp's qualifications to act as receiver, or to qualify as such by the filing of the required bond,

On March 23, 1933, after a further hearing, at which the solicitors for complainant and Keogh, pro se, were present, the court ordered that Adam J. Lang "is hereby appointed Receiver of the premises described in said order of March 3, 1933, with the same rights, powers and duties as were thereby vested and conferred upon said Joseph W. Cremin, and that said Lang give a receiver's bond in the sum of $5,000, as provided in said order of March 3rd, before assuming the duties of such receivership." Among the findings in the order are that it appears that said Cremin "has declined to act as receiver and has refused to qualify as such and that complainant is entitled to the appointment of some other person as receiver in lieu of said Cremin;" and that it further appears that a complainant's bond in the sum of $1,000 has herein been presented, approved and filed and that said bond is a sufficient protection to said Keogh. Lang thereafter qualified as such receiver and took possession of the premises as such.

On April 20, 1933, within 30 days after Lang's appointment as receiver, Keogh perfected the present appeal in the superior court by there filing his bond with surety with the clerk of that court and obtaining the clerk's approval of the bond in accordance with the statute. On May 12, 1933, within 60 days after Lang's said appointment, Keogh perfected his appeal in this appellate court by the filing of the clerk's transcript of the record, also in accordance with the statute.

The present record further discloses that on April 8, 1933, there was filed in the superior court Keogh's written motion, dated March 3, 1933, in which it is stated: "Now comes John W. Keogh, appearing pro se, in resistance to and in response to complainant's motion for the appointment of a receiver, and moves this court to dismiss the bill of complaint herein on the ground that the court is without

On March 22, 1972, after a further hearing, at which the petitioners for complainant and Joseph Ann Lee were present, the court entered its order in the Bundy complaint [illegible] of the previous counsel in said order of March 3, 1972, with the same rights, powers and duties in such transfer trustee and conferred upon said Joseph A. Lewis, and that said Lee pay a receiver's bond in the sum of $1,000, at present in full force of March 3rd, before assuming the duties of said receivership. Among the findings in the order are that it appears that said domain "has declines to act as receiver and has refused to qualify as such and that complainant is entitled to the appointment of some other person as receiver in lieu of said Trowbridge" and that it further appears that a complainant's bond in the sum of $1,000 has herein been presented, approved and filed and that said bond is a sufficient protection in said Bundy. Joseph Lewis qualified as such receiver and took possession of the premises as such.

On April 20, 1972, within 30 days after Lewis's appointment as receiver, Joseph petitioned the present appeal in the superior court by there filing his bond with said county with the clerk of that court and obtaining the clerk's approval of the bond in accordance with the statute. On May 12, 1972, within 60 days after Lewis's said appointment, Joseph perfected his appeal in this appellate court by the filing of the clerk's transcript of the record, also in accordance with the statute.

The present record further indicates that on April 6, 1972, there was filed in the superior court Joseph's motion herein, dated March 3, 1972, in which it is stated: "Now comes John A. Joseph, appellant herein and in resistance to and in response to complainant's motion for the appointment of a receiver, can moves this court to dismiss the bill of complaint herein on the ground that the court is without

jurisdiction to entertain the bill or to grant the relief prayed for therein," for the following reasons: (Here are set forth the same reasons as stated in his answer to complainant's bill as above outlined.) The record further discloses that on the same day (April 8, 1933), the court entered an order, "Nunc pro tunc March 3, 1933, to correct and restore the record herein," which is in substance as follows:

> It appearing to the court that upon the coming in of complainant's motion for the appointment of a receiver for the premises, Keogh, one of the defendants, in resisting the motion, moved the court to dismiss complainant's bill on the ground that the court is "without jurisdiction in the matter," that the motion was duly heard and denied, but that no notation was made by the clerk either of the motion or of the court's ruling thereon, it is ORDERED that the records of the court be corrected accordingly, and that the clerk cause to be noted, enrolled and engrossed, as of March 3, 1933, the following order, * *:
>
> "It is hereby ordered, adjudged and decreed that said motion to dismiss the bill of complaint for want of jurisdiction be and it is hereby denied."

After the record has been filed in this court, complainant filed a written motion with accompanying suggestions to dismiss the appeal. Upon counter suggestions being filed, the motion was reserved to the hearing. It will now be denied. Complainant's contention is in substance that a receiver, Cremin, was appointed by the court's order of March 3, 1933; that when he refused to qualify, the court (by its order of March 23rd) merely "substituted" Lang as receiver in place of Cremin; that appellant did not perfect his appeal in the superior court by the filing of his bond with the clerk of the superior court within 30 days from the appointment of the receiver; and that, hence, the statute was not sufficiently complied with as to allow this court to consider the appeal. We cannot agree with the contention. Lang was not a "substituted" receiver. Cremin's appointment never became effective and Lang's appointment, on March 23rd, followed by his qualifying as receiver and taking possession of the premises, was in the nature of an original appointment. And we do not think that the holdings and decision in International, etc.

Intimidation to substain the bill or to grant the relief prayed for therein," for the following reasons: (here our set forth the same reasons as stated in his answer to complainant's bill as above outlined.) The Probate Judge claimed that on the same day (April 8, 1955), the court entered an order, "*Ex parte* *Jane Doe* March 8, 1955, be convened and restore the lawful burden," which is in substance as follows:

> It appearing to the court that upon the petition in of complainant's petition for the appointment of a receiver for the premises, though, one of the defendants, by presenting the petition, proved the court by *Andrew* complainant's bill as the proved that the court is "without jurisdiction in the matter," that the petition was duly issued and duly, the last on petition was made by the clerk either of the matter or of the court's valid therein. It is *ordered* that the records of the court be corrected accordingly, and that the issue cause to be noted, entered and engrossed, as of March 3, 1955, the following order,
>
> "It is hereby ordered, adjudged and decreed that said petition to direct the bill of complaint for want of jurisdiction be and it is hereby denied."

After the record had been filed in this court, complainant filed a motion under accompanying suggestions to direct the appeal. Upon consideration being filed, the motion was reserved to the hearing. It will now be denied. Complainant's contention is substance that a receiver, therein, was appointed by the court's order of March 3, 1955; that since he returned to qualify, the court (by its order of March 22nd) merely "substituted" Jane as receiver in place of Grenell; that upon qualifying she may perfect her appeal in the superior court by the filing of her bond with the clerk of the superior court within 20 days from the appointment of the receiver; and that, hence, the statute was not jurisdictionally complied with so as allow this court to consider the appeal. We cannot agree with the contention. Jane was not a "substituted" receiver. Grenell's appointment never became effective and Jane's appointment, on March 22nd, followed by her qualifying as receiver and filing proceedings of the premises, was in the nature of an original appointment. And we do not think that the hearings and decision in *Intermediate* case

Union v. McGonigle, 72 Ill. App. 399, 401, when the facts there shown are considered, is authority to the contrary.

In view of the allegations of complainant's verified bill and the admissions of Keogh in his answer thereto, we are of the opinion that the court was fully justified, under numerous decisions of the courts of review of this State which we do not deem it necessary to cite, in appointing Lang as receiver, pendente lite, to take possession of the premises, collect the rents and preserve the property from waste, etc.

But the main contention of Keogh, here urged, is that the superior court erred in the appointment of any receiver pendente lite of the premises, because that court was "without jurisdiction" to entertain complainant's bill (a common and ordinary bill to foreclose a mortgage) for the reasons stated (as above outlined) in his answer, and in his subsequently filed motion to dismiss said bill which the court denied. We find no merit in the contention. That a court of general jurisdiction, such as the superior court of Cook county, may entertain a bill for the foreclosure of a mortgage on real estate, and may also upon a proper showing appoint a receiver pendente lite to collect the rents and to preserve the property from waste, etc., is unquestioned. And we are not impressed with the force of any of the reasons stated by Keogh for his contention. Furthermore, the appointment of a receiver is an interlocutory one and, as said in Coates v. Cunningham, 80 Ill. 467, 468, "does not determine any right nor affect the title of either party in any manner whatever."

On the day that the present appeal was orally argued before us by Keogh, pro se, he presented a motion with written suggestions, that this court, "certify the question presented in this cause to the Supreme Court of Illinois, without passing upon the merits of the issue." The motion was denied, and properly

Ellis v. McCullin, 7 Ill. App. 308, 311, when the facts upon which are established, is authority to the contrary.

In view of the allegations of complainant's verified bill and the conclusions of fact in his answer thereto, we are of the opinion that the court was fully justified, under controlling decisions of the courts of review of this state which we do not deem it necessary to cite, in granting the restraining order, pending the hearing of the preliminary injunction, without the power and property line dispute, etc.

As the main contention of counsel, here urged, is that the regular course taken in the appointment of any receiver pending the hearing of the petition, between such cases as "without jurisdiction" in contravention complainant's bill is common and authority that he foreclose a mortgage) for the reasons stated (on page seventeen) in his answer, and in his accompanying filed motion to dismiss said bill which the court denied. We find no merit in the contention. Then a court of general jurisdiction, such as the superior court of Cook county, may entertain a bill for the foreclosure of a mortgage on real estate, and may also upon a proper showing appoint a receiver pending litigation to collect the rents due to preserve the property from waste, etc., in emergencies. And as has not impaired with the force of any of the reasons stated by Kogh for his conclusions, furthermore, the appointment of a receiver is an interlocutory one and, as said in Jones v. Chamberlain, 96 Ill. 267, 268, "does not determine any right nor affect the title of either party in any manner whatever."

In the top that the petition appears was orally argued before us by Kogh, and he presented a motion with written suggestions, that this court, "finally the question presented in this case in the superior court of Illinois, without passing upon the merits of the cause." The motion was denied, and properly

so. It is only by virtue of the provisions of section 123 of the Practice Act that the present appeal, from an interlocutory order or decree appointing a receiver of the premises in question, is before us. In that section it is provided: "Upon such appeal the appellate court may affirm, modify or reverse such interlocutory order or decree, and shall direct such proceedings to be had in the court below as the justice of the case may require. * * No appeal shall lie or writ of error be prosecuted from the order entered by said appellate court on any such appeal."

Our conclusion is that the order or decree of the superior court, entered on March 23rd, 1933, appointing Adam J. Lang as receiver of the premises in question, should be affirmed, and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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36180

JAMES HAMILTON LEWIS,
Appellant,

v.

MARY A. BRAUN, individually and as administratrix, etc., FOREMAN-STATE TRUST & SAVINGS BANK, a corporation, etc., CANADIAN PACIFIC RAILWAY COMPANY, a corporation, etc.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

272 I.A. 605

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The complainant, James Hamilton Lewis, filed his bill against Mary A. Braun, individually and as administratrix of the estate of Jacob G. Braun, deceased, The Foreman-State Trust and Savings Bank, an Illinois corporation, and Canadian Pacific Railway Company, a corporation organized and existing under the laws of Canada, defendants. Mary A. Braun and Canadian Pacific Railway Company (hereinafter called Railway Company) filed demurrers to the amended bill, which were sustained, and complainant electing to stand by the bill it was dismissed as to the said defendants. Foreman-State Trust and Savings Bank filed an answer stating that it had in its custody and control 470 shares of the capital stock of the Railway Company, which it was holding as depository, subject to the order of the Probate court of Cook county entered in the matter of the estate of Jacob G. Braun, deceased. The bill was also dismissed as to the defendant Bank on the ground, as appears from the decree, that the interest of defendant Bank is alleged in the amended bill to be that of custodian and hence subordinate to the interests of defendant Mary A. Braun, individually and as administratrix. Complainant appeals.

The complainant, Jones Hamilton Lewis, filed his bill against Mary A. Brown, individually and as administratrix of the estate of Jacob G. Brown, deceased, the Furness-Lewis Trust and Savings Bank, an illinois corporation, and Columbia Fidelity Building Company, a corporation organized and existing under the laws of Illinois, defendants. Mary A. Brown and Columbia Fidelity Building Company (hereinafter called Building Company) filed demurrers to the amended bill, which were sustained, and complainant elected to stand by the bill. It was dismissed as to the said defendants. Furness-Lewis Trust and Savings Bank filed an answer denying that it had in its custody and control any money of the capital stock of the Building Company, which it was holding as receiver, subject to the order of the Probate Court of Cook County, which was holding in the matter of the estate of Jacob G. Brown, deceased. The bill was also dismissed as to the defendant bank on the ground, as appears from the decree, that the interest of defendant Bank is alleged in the amended bill to be that of creditor and hence adversions to the interests of defendant Mary A. Brown, individually and as administratrix. Complainant appeals.

The amended bill alleges that complainant, an attorney at law, on July 17, 1920, entered into the following written contract:

"This is to authorize Jas. Hamilton Lewis to act as my attorney and representative in the matter of the shares of the Canadian-Pacific Railway belonging to me, for the purpose of having the shares properly transferred, and such certificates as are necessary to be issued to me, and for such other steps as are necessary to put the property in my name, in order that I may have clear title, and then to take any other course he feels necessary to secure the dividends which are due on the stock. And I authorize him to make any demands in my name and to take any course in my name that in his judgment is best to bring about the result of my protection and the protection of my property and the fixing of the shares in my name and the collection for me of such sum as is due.

"In the event of my death, should such occur, and the collection of money or the transfer of shares be had after my death, then the said Jas. Hamilton Lewis is to take such course and action with the shares and money as my will would provide or any directions I may have given to my wife or any other person in writing as to my property.

"(signed) Jacob G. Braun

"Witness:
"Joseph P. O'Hara (signed)

"I approve of the above and to the extent of my own interest authorize Jas. Hamilton Lewis for the same purposes as authorized by my husband.

"(signed) Mary A. Braun
wife of Jacob G. Braun

"Witness:
"Joseph P. O'Hara (signed)

"I accept the above named commission and contract of service, leaving the matter of fees and payments for services to be arranged at such time as shall be proper.

"(signed) James Hamilton Lewis."

The bill further alleges that complainant thereafter "pursued the performance of the aforesaid contract," and on November 27, 1920, entered into a further written agreement, "supplemental to the foregoing," as follows:

"Referring to the instrument made by and between James Hamilton Lewis and Jacob G. Braun on July 17th, 1920, (bearing the written approval of Mary A. Braun) providing for the recovery of the shares of stock in the Canadian Pacific Railway Company, and the accumulated dividends thereon, as in

The memoir this writer makes complainant, on account of

as law, on July 17, 1930, received into the following verbatim

[illegible]

"This is to authorize Mr. Hamilton Davis to act on my
attorney and representative in the matter of the course of the
Kansas-Nebraska Railway building in my, for the purpose of having
the above properly repaired, and such contributions as are
necessary to be issued in it, and the same after paying as are
necessary to pay the property in my name, in order that I may
have clear title, the time is time my other owners in lands
[illegible] in making the [illegible] with our due to the claims.
and I authorize him to make any changes in my name and to take any
[illegible] in my name that in his judgment is best to bring about the
[illegible] of my premises and the protection of my property and the
[illegible] of the [illegible] in my name and the [illegible] for me or such
[illegible] as is just.

"In the event of my [illegible], [illegible] such [illegible], see the
[illegible] of [illegible] or [illegible] of [illegible] be [illegible] by
[illegible], then the said Hamilton Davis is to take such [illegible]
and [illegible] with the [illegible] and money so my will [illegible] or
any [illegible] I may have [illegible] to my [illegible] or any other [illegible]
[illegible] on to my property.

"[signed] Jacob A. Brown

"Witness:
"Jacob T. O'Shea (signed)

"I approve of the above and to the account of my own
[illegible] Mr. Hamilton Davis for the same purposes as
[illegible] by [illegible].
"[signed] Mary A. Brown
wife of Jacob O. Brown

"Witness:
"Jacob T. O'Shea (signed)

"I accept the above [illegible] and contract of
service, leaving the matter of fees and payments for services to
be arranged at such time as shall be proper.

"[signed] James Hamilton Davis."

The writ further alleges that complainant thereafter "performed the
performance of the aforesaid contract," and on November 17, 1930,
entered into a further written agreement, "supplemental to the
foregoing," as follows:

"Whereas in the instrument made by and between
James Hamilton Davis and Jacob A. Brown on July 17th, 1930,
(having the written approval of Mary A. Brown) providing for
the recovery of the shares of stock in the Dunkerton Terrill
Railway Company, and the accumulated dividends thereon, as is

said instrument mentioned, the matter of fees and payments for services in connection therewith is hereby agreed upon as follows:

"On the total amount recovered up to the sum or value of $65,000 the fee and payment for services shall be 20 per cent thereof; and on all recovered in excess of said $65,000 the fee and payment for services shall be 50 per cent thereof. And said Braun will provide all funds for necessary expenses, and make reimbursement for all necessary outlays therefor, without deduction from said fees, provided that said expense fund shall not in all exceed $1,000.

"(Signed) Jacob G. Braun

(Signed)
"O. K., Mary A. Braun

"(Signed) James Hamilton Lewis
"by Andrew R. Sherriff."

The bill further avers that complainant has at all times, by himself and his associates, "diligently and fully performed said contract on his part, that the same is in full force and effect, and that this amended bill is brought in due course of the performance thereof, and in pursuit of the relief, remedies and recoveries thereby contemplated;" that the subject matter of the contract consists of 470 shares of common stock of the Railway Company, of the par value of $100 per share, represented by 48 certificates; that some of said certificates were written with the name "G. Schlesinger-Trier & Co." inserted therein, and others were written with the name "Nationalbank fur Deutschland" inserted therein as the holders of said certificates; that in October, 1919, Jacob G. Braun purchased, in the open market and at the current market price, all of the said certificates, with all of the unpaid dividends thereon and rights and interests thereunto pertaining; that he promptly thereafter presented the certificates at the proper transfer and registration agencies of defendant Railway Company for transfer to and registration in his name, and then and there duly requested that such transfer and registration be made, but that said defendant has ever since wrongfully refused to make such transfer and registration or to issue new certificates in lieu thereof as requested;

said instrument particularly, its nature or form and generally the nature in connection therewith is hereby agreed upon as follows:

"In the total amount invested on is the sum of value of 165,000 the for the payment for notices shall be 30 per cent thereof; and as all instruments in numbers of said 165,000 the five and payment for certain part, be 60 per cent interest, the said Bryan will provide all funds for necessary expenses, and make investments in all necessary stolen instruments, without charging them with these payments that will exceed that shall not in all amount 15,000.

"(Signed) Jacob B. Brown

(Signed)
"B. Ben Bailey J. Brown

"(Signed) Owen Hamilton Berry
"By Jeffrey B. Cheswell."

The bill further avows that complainant has at all times, by himself and his counsel, "diligently and fully performed and complied on his part, that the case is in full force and effect, and that this amended bill is brought in the course of the performance thereof, and in pursuit of the orderly remedies and recoveries thereby contemplated." That the subject matter of the contract consists of 175 shares of common stock of the Delaney Company, of the par value of $100 per share, represented by 12 certificates that name of said certificates were written with the name "B. Schlesinger-Trier & Co." Imperial Theatre, and others were written with the name "Mitteldeutsche Kur Gesellschaft" inserted through on the motives of this certificates that in October, 1919, Jacob B. Brown purchased, in the open market and in the ordinary market price, all of the said certificates, with all of the unpaid dividends thereon and rights and interests thereunto pertaining that he properly therefore presented the certificates of the proper issuance and registration expenses at intervals taking delivery for transfer in all registrations in his name, and then and there duly returned that such transfer and registration be made, but that said defendants has ever since wrongfully refused to make such transfer and registration or to issue new certificates in lieu thereof on requested;

that said Braun demanded of said defendant the payment to him of all unpaid dividends which had been declared on said shares from and after July, 1914, but that said defendant has ever since refused to pay over to said Braun any of said dividends; that Jacob G. Braun was a resident of Chicago, Illinois, and died there intestate in February, 1921; that Mary A. Braun was appointed administratrix of his estate and still continues as such; that the said certificates are held by defendant Bank as agent and custodian for said administratrix and the estate of Jacob G. Braun, "subject to the right of your orator to have possession of same for all proper uses and purposes in accordance with the above described contract and supplemental agreement, and for the recovery of all rights, benefits and emoluments pertaining thereto, and for the purposes of this suit." The bill further alleges "that by virtue and effect of the aforesaid contract and supplemental agreement of your orator with Jacob G. Braun and Mary A. Braun, and because of the subsequent acts, transactions, appropriations, and course of conduct of, by and between said parties respectively in relation and pursuant thereto, and the pecuniary expenses necessarily incurred by your orator in course of his performance thereof, your orator is in equity the assignee of a specific portion of, and has a lien in equity or an equitable lien, - and by virtue and effect of the aforesaid contract and supplemental agreement, and because of the work and services performed pursuant thereto, under the laws and statutes of the State of Illinois * * *, your orator has a legal and statutory lien, - upon all the said certificates and shares of stock, being in themselves the cause of action and subject matter of said contract, and upon all claims, demands and causes of action held or claimed against the said defendant Canadian Pacific Railway Company, by or for said Jacob G. Braun in his lifetime, and since then by or

for any of his heirs or legal representatives, appurtenant to or growing out of his ownership of said certificates and shares of stock and the dividends thereon, which are the subject matter of said contract and supplemental agreement, and upon all the proceeds and avails thereof resulting from any collection, action or proceeding thereon against the defendant Canadian Pacific Railway Company, or any other adverse claimant thereto, for the amount of the fees and compensation of your orator so agreed upon, and his expenses duly incurred now remaining unpaid to him;" that complainant has served due notice upon Railway Company of his alleged rights by virtue of the contract and supplemental agreement, and that the present value represented by the certificates, exclusive of dividends, is about $96,000; that there is now due from said Company on account of dividends withheld the sum of $75,000; that said Company, by wrongfully refusing to transfer these shares of stock, has rendered the same unsalable, and is liable in damages to the lawful holders and owners of said certificates of stock in the sum of approximately $200,000; that the excuses given by said Company for refusing to transfer said shares and issue new certificates therefor, and for refusing to pay over the accumulated dividends thereon, "as stated by said defendant to your orator in prosecuting the claim, were that all said property had been subjected to adverse claims asserted against said property by the Custodian of Enemy Property of Canada, an official acting under the war laws of said nation, growing out of proceedings had in Canada during the late World War purporting to affect said shares of stock, on the supposition that they belonged to the foreign enemies of Canada in said war; but your orator, being fully advised, further avers as a matter of fact and of law that all such adverse claims were and are groundless and void, and were not a lawful, valid, or tenable excuse for depriving said Jacob G. Braun

or his heirs, next of kin or legal representatives, or your orator, of any of said shares of stock or the attributes and increments thereof." The bill further alleges that after the death of Braun Mary A. Braun, in her individual right and as administratrix of the estate, "fully recognized the existence and binding force of said contract and supplemental agreement, and expressly elected to continue and did continue in the performance thereof on her part with your orator for a long period of time;" that from the time of the making of the contract until the present complainant has diligently endeavored to prevail on said Custodian of Enemy Property of Canada to abandon his said claims or to pay and settle for said property on reasonable terms in money, and in January, 1925, said official offered to pay to complainant the sum of $58,750 in cash, which is a larger sum than Jacob G. Braun paid for the certificates, but defendant Mary A. Braun refused to accept the said offer, "and thereafter by and through other persons and agents she interfered with, hindered and embarrassed the continued negotiations being pursued by your orator with said Custodian * * * to pay a larger sum or make better terms in settlement as aforesaid, with the result that said official, because and by reason of such interference and resulting disorder, refused to negotiate further with your orator;" that by reason of said refusal "it became necessary to resort to litigation against the Railway Company to clear the title and for the recovery of said shares and dividends; and accordingly your orator, acting upon the authority and in performance of the aforesaid contract, in June, 1925, instituted a suit in equity, number 4915 in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the name of himself and said Mary A. Braun individually and as administratrix aforesaid, as complain-

ants, against said Railway Company as defendant, to compel the transfer of said shares and the delivery of new certificates therefor, and the payment of the accumulated dividends thereon," and that complainant devoted a great amount of time and professional skill and labor to the prosecution of said suit for more than five years, and by means of said labor, etc., "it was fairly and fully demonstrated as a matter of fact and of law, that the Railway Company had no valid defense to the aforesaid claims and action for relief on the substance and merits of said suit; but said Mary A. Braun, the co-plaintiff there, by interposing repeated objections to her joinder as a co-plaintiff in said suit and demanding her release therefrom in said court, all in violation of her aforesaid contract and the rights of your orator thereunder, so hindered and embarrassed the prosecution of said suit, that the said court, and the United States Circuit Court of Appeals for the Seventh Circuit on appeal of said suit by your orator, held respectively that each of said courts, by such obstructive conduct of said Mary A. Braun, was prevented under its special rules of procedure, for want of necessary parties plaintiff, from deciding said suit on the merits of the bill and the evidence against said Railway Company, and thereby said litigation, covering the period from June, 1925, until October, 1930, was rendered futile and of no effect; * * * that the said defendant Mary A. Braun has thus refused and continues to refuse to co-operate with your orator as is her obligation and duty under said contract, in the prosecution thereof for the recoveries as aforesaid, and that she prevents your orator from performing it, and persists in violating her contract in the manner aforesaid; that such unlawful and inequitable conduct on the part of the said defendant constitutes a fraud upon the rights and equities of your orator subsisting by virtue of the aforesaid contract, for which

water, against said Railway Company as defendant, on account the
insanity of said Jones and the infirmity of her mentalities
thereto, and the payment of the aforementioned mortgage thereon,
and that complainant devoted a great amount of time and professional
skill and labor to the prosecution of said suit for more than five
years, and by reason of said labor, was, "It was fairly and fully
demonstrated as a matter of fact and of law, that the Railway Company
had no valid defense to the aforesaid claims and action for relief
on the substance and merits of said suit; but said Mary A. Brown,
the co-plaintiff there, by intervening repeated objections to her
joinder as a co-plaintiff in said suit and demanding her release
therefrom in said court, all in violation of her aforesaid con-
tract and the rights of your orator thereunder, so hindered and
embarrassed the prosecution of said suit, that the said court, and
the United States Circuit Court of Appeals for the Seventh Circuit
on appeal of said suit by your orator, held erroneously that such
of said counts, by such adversative conduct of said Mary A. Brown,
was prevented under its special rules of procedure, for want of
necessary parties plaintiff, from deciding said suit on the merits
of the bill and the evidence against said Railway Company, and
thereby said litigation, covering the period from June, 1908, until
October, 1909, was rendered futile and of no effect; " " that
the said defendant Mary A. Brown has what relates to her interest is
refuse to co-operate with your orator as is her obligation and duty
under said contract, in the prosecution thereof for the recovery
as aforesaid, and that she prevents your orator from prosecuting
it, and persists in violating her contract in the manner aforesaid;
that your material and invaluable contract on the part of the said
defendant constitutes a fraud upon the rights and equities of your
orator substituting by virtue of the aforesaid contract, for which

there is no adequate remedy at law;" that the complainant has fully performed said contract on his part in so far as Mary A. Braun has permitted him to do, that he is ready, able and willing to continue to perform same, and that a full recovery of all rights and values of said shares of stock, with the unpaid dividends due upon the same, can by due and lawful process, by litigation or otherwise, "be made and recovered by your orator from the defendant Railway Company, with the due co-operation, or cessation of interference and obstruction, on the part of the defendant Mary A. Braun, as provided and required by the aforesaid contract and supplemental agreement; and full remedy for your orator can be had with the due and adequate aid of this court of equity against both the said defendants." The bill further alleges that Mary A. Braun has wrongfully aided and assisted the Railway Company to defeat the litigation, and that the Railway Company has aided Mary A. Braun to violate her contract with complainant and to hinder and embarrass the aforesaid litigation and to prevent a recovery of the shares and property, and that such conduct "constituted an unconscionable method of co-operation by and between them against the contract, the rights and equities, of your orator," for which there is no adequate remedy provided by law. The bill prays that it be adjudged that complainant, "because the aforesaid contract and supplemental agreement, by force of the principles of law and equity has an equitable lien upon, and a pro tanto assignment of, all the aforesaid certificates of stock and the rights embodied therein and the corporate shares in said defendant Railway Company thereby represented, also upon all dividends declared thereon since July, 1914, withheld from payment and now owing by said defendant corporation to the Estate of Jacob G. Braun as aforesaid, with lawful interest * * *; that by virtue of the statute * * * your

orator has also a statutory lien on all of said property and rights and upon all claims, demands and causes of action therefor or grounded thereon; that the court * * * will ascertain the full and true value of all said property and rights; and for the just and equitable protection of the rights, liens and title of your orator by virtue of said contract, that the court will enforce the said contract by all lawful and equitable means and methods within its power against the defendant Mary A. Braun both individually and as administratrix aforesaid, and that the court, in the right of said Mary A. Braun individually and as administratrix aforesaid, but subject to the rights and liens, and for the use and benefit of your orator in accordance with his rights, privileges, and emoluments provided for him by and under the contract aforesaid, will enforce all of the rights embodied in or pertaining to said certificates and shares of stock and the dividends thereon as aforesaid, against the Railway Company, in the full measure required by equity and good conscience * * *; that the court will compel the said Railway Company properly to transfer and register the title of said certificates and shares of stock, by the delivery to your orator or to some other duly authorized officer of this court, of new certificates of stock for the requisite number of shares, made out to such name or names as the court may direct for the proper and convenient distribution of such certificates and shares to your orator and among other parties found to be entitled thereto by rights in the Estate of Jacob G. Braun; or in lieu thereof that the court will ascertain the true value of all of the shares represented by the certificates hereinabove described and will award to your orator, for the use of himself and the Estate of Jacob G. Braun, the amount of the value thereof in money as damages for the withholding of such new certificates; that the court will award, * * * for the use and benefit

of your orator and said defendant Mary A. Braun individually or as administratrix, as their interests may appear, a full recovery of all the above described shares and dividends with lawful interest thereon, and compensation or damages for the injuries to or deprivation of all other property and rights pertaining to said shares which may appear to have been suffered by the representatives of the estate of Jacob G. Braun and by your orator as a lienor thereon as aforesaid; that the court will expressly authorize your orator, on behalf of the Estate of Jacob G. Braun and all persons interested therein or thereunder, to negotiate further for the settlement, disposal and conclusion of all controversies pertaining to the matters and things herein set forth, and will restrain all other parties and persons from interfering with such negotiations." The prayer calls for other relief, but it is not necessary to recite the same.

Complainant contends, (a) "the bill sufficiently declares the claim of an equitable lien on the subject matter of the attorney's contract," and (b) "the bill declares an attorney's statutory lien on the subject matter of his contract," and that therefore the chancellor erred in sustaining the demurrer to the bill. It appears that the contract of July 17, 1920, and the supplemental agreement of November 27, 1920, which form the basis of the present bill, have been construed by the United States Circuit Court of Appeals, Seventh Circuit, in the case of James Hamilton Lewis v. Canadian Pacific Railway Company et al., 59 Fed. (2d) 354. (Certiorari denied by the United States supreme court. See Lewis v. Canadian Pac. Ry. Co. (No. 354), 282 U. S. 869.) In that case Lewis, in his own name, instituted an action against the Railway Company to compel the transfer of the shares in question in the instant proceeding, and for the payment of the accrued

dividends on the same. On motion of the Railway Company this suit was dismissed, but Lewis was permitted to file an amended bill of complaint in which he joined as plaintiff Mary A. Braun, individually and as administratrix of the estate of Jacob G. Braun. Later Mary A. Braun, individually and as such administratrix, entered a special appearance and moved the court to strike from the record all pleadings on the grounds that she had not, either individually or as administratrix, authorized the suit filed, that she had never ratified or confirmed the filing of it, and that she did not desire to be, become or remain a party thereto. A decision on this motion was reserved until the final hearing on the merits, at which time it was sustained and she, in her dual capacity, was dismissed as party complainant and her name was stricken from the amended bill of complaint. Upon the final hearing the said bill was dismissed for want of equity and Lewis appealed, naming Mary A. Braun, individually and as administratrix, as appellee with the appellee Railway Company. In its opinion the court states:

"It is quite apparent that appellant is not claiming his right by virtue of being executor, administrator, guardian, or a party with whom or in whose name a contract has been made for the benefit of another. He must, therefore, qualify either as a real party in interest, as a trustee of an express trust, or as a party expressly authorized by statute.

"Whatever interest appellant has is derived from the two agreements entered into on the respective dates of July 17, 1920, and November 27, 1920. The first agreement merely authorizes Lewis to act as Braun's attorney and representative in the matter of the shares of stock belonging to Braun. The purposes of the agreement are: (1) to have the shares properly transferred to Braun; (2) to have the necessary certificates issued to Braun; (3) to put the property in Braun's name in order that he may have a clear title; (4) to secure for Braun the dividends due on the stock, and to collect such sum as is due him; (5) to bring about the protection of Braun and of his property. To accomplish these purposes Braun authorizes Lewis to take any steps and any course in Braun's name, and to make any demands in his name which in Lewis's judgment is best. Then follows a provision that, in case of Braun's death, Lewis is to take such course and action with the shares and money (1) as Braun's 'will would provide'; (2) or as any directions may provide which Braun may give in writing to either his wife or any other person.

"Mr. Braun left neither a will nor written directions, which fact, in our opinion, eliminates from our consideration the provision last referred to. Conversely stated, the provision must, we think, be construed to mean that, if Braun left no directions by will or other writing, then there was no authority to act after his death, unless the written agreement conveyed or granted to Lewis some interest in the subject matter. We think it conveyed no such interest. There is no granting or conveying clause, so far as Mr. Lewis is concerned. It is merely a commission and contract for service, and the matter of fees and payment for services of Mr. Lewis was to be arranged at some proper time in the future. This is the identical language used by him in his written acceptance, attached thereto.

"Mrs. Braun, in writing, approved the agreement, and to the extent of her own interest authorized Lewis for the same purposes as authorized by her husband. She had no interest whatever in the shares of stock or dividends, and, if the authority granted by her to Lewis is to be measured by her interest therein, she gave none. She at least granted no more authority to Lewis than did her husband, and certainly he did not grant or convey any interest in the subject-matter by the first agreement.

"The second agreement states that the matter of fees and payment for services on the total amount recovered up to the sum or value of $65,000 shall be 20 per cent. thereof; and on all recovered in excess of $65,000 it shall be 50 per cent. thereof. Mrs. Braun merely signed an O. K. thereto. This language is certainly not sufficient to create a present interest in Lewis in the stock or dividends. He was to get no part of the stock in his name, for, according to the agreement, it was all to be transferred, and certificates issued, to Braun; likewise the agreement gave him no present interest in the dividends, for it explicitly states that they are to be collected for Braun. Lewis was to receive as a fee and payment for services certain per cents of the value of the property recovered.

"There is a vast difference between a mere agency and an agency coupled with an interest. Likewise there is a great difference in interests with which the agency may be coupled. This subject is very thoroughly and clearly discussed in Mechem on Agency, Secs. 561 et seq. In section 570 he separates such interests into three classes - (1) interest in the result of the agent's action; (2) interest in the power, or the right to exercise the authority; (3) interest in the subject matter, or the thing itself. The first he classes as agency with mere naked power. This is always revoked by death, and may be revoked by the principal at any time without cause, provided the injury, if any, caused to the agent by such revocation can be measured in damages. As illustrative of this class he cites the agent who is authorized to collect a debt and is to have for his services a commission or a share of what he collects. Section 586. In the second class he places the agent who, by reason of the exercise of his authority, has been placed in a harmful position, and has suffered, or will suffer, injury which cannot be compensated in damages. In such event the agent is said to have an interest in the power or the right to exercise the authority as a means of reimbursement, indemnity, or protection. This sort of agency, says Mr. Mechem, cannot be revoked by the principal, but is always revoked by the principal's death. The test between classes 1 and 2 is whether the agent has some interest to be protected other than his mere employment or the

"Mr. Brown feels neither a will nor volition direction, which feels, in our opinion, eliminates from our consideration the previous last referred to. Conversely stated, the previous case, so stated, he concerned to mean that, if Brown feels no activity by will or other volition, then there was no authority to act after the death. Under the relevant circumstances, therefore, Lewis in fact come interest in the subject matter. By that it accepted no such interest. There is no granting or conveying clause, as for an Mr. Lewis in succession. It is merely a commission and contract for service, and the matter of fees and payment for services of Mr. Lewis was to be arranged at some proper time in the future. This is the intended language used by him in his written correspondence, otherwise therefore.

"Mr. Brown, in writing, approved the agreement, and in the absence of any con interest authorized Lewis for the same purposes as authorized by his husband. Mr had no interest whatever in the shares of stock or dividends, and, if the authority granted by Mr. to Lewis to be measured by her interest therein, the grey area. Mr of Jane granted no more authority to Lewis than did her husband, and authority he did not grant or convey any interest in the subject matter by the first agreement.

"The second agreement states that the matter of fees and payment for services on the part should recovered up to the sum or value of $25,000 shall be to her sole. Thereof and on all recovered in excess of $25,000 it shall be to her sole. Thereof. Mrs. Brown merely signed on t. I. thereon. This language is certainly not sufficient to create a present interest in Lewis in the stock or dividends. He was to get no part of the stock in his name, for authority to the agreement. It was did is to be transferred, and specifically limited, in strong language the agreement gave him no present interest in the dividends, for it expressly states that they are to be collected for Brown. Lewis was to receive as a fee and payment for services certain per cents of the value of the property recovered.

"There is a vast difference between a mere agency and an agency coupled with an interest. Between these is a great difference in instances with which the agency may be coupled. This subject is very thoroughly and clearly discussed in Benson on Agency. Here, all as say, in section 173 he expresses such distinction into three classes - (1) interest in the results of the agent's action; (2) interest in the power, or the right to exercise the authority; (3) interest in the subject matter, or the thing itself. The first the classes an agency with more moral power, this is simply revoked by death, and may be revoked by the principal at any time without cause, provided the injury, if any, caused to the agent by such revocation can be measured in damages. An illustrative of this class be often the agent who is authorized to collect a debt and is to have for his services a commission or a share of what he collects. Section 174. In the second class be placed the agent who, by reason of the exercise of his authority, has been placed in a hostile position, and has suffered, or will suffer, injury which cannot be compensated in damages. In such event the agent is held to have an interest in the power on the right to exercise the authority as a means of indemnification, indemnity, or protection. This sort of agency, says Mr. Benson, cannot be revoked by the principal, but is always revoked by the principal's death. The best between classes 1 and 2 is whether the agent has some interest to be protected other than his mere employment or the

opportunity to exercise the power in order to earn his commission or compensation. Section 578. The third class embraces all agents who have an actual present interest in the subject-matter, and such agencies can be revoked neither by the principal nor death. Section 574.

"The analysis and the principles laid down by Mr. Mechem are fully supported by the leading case of Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 173, 203, 5 L. Ed. 589. The phrase 'coupled with an interest' sufficient to survive death has never been defined more clearly than by Chief Justice Marshall in that case. He says:

"'We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. * * * "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot * * * be said to be "coupled" with it.'

"Appellant cites the case of Spellman v. Bankers' Trust Co., Executor (C. C. A.) 6 F. (2d) 799, 800, in support of the proposition that, to a suit by an attorney having a contract for a contingent fee to enforce his right against property or a fund, the client is a necessary party. That suit was one by the attorney to establish his fee, in which suit he claimed to be an equitable assignee of a fractional share of the estate. He had contracted with one of the heirs to attack the ancestor's will and to recover the heir's share of the estate, for which the attorney was to receive 50 per cent. of whatever might be recovered in money or in property. He was dismissed by his client, and brought this action, which went to decree, before the action attacking the will was adjusted. His theory was that he had an equitable interest in the funds of the estate in the hands of the executor. The court held that under the contract he was not a legal assignee, and that as an alleged equitable assignee he could not maintain the action without his client. Immediately preceding this ruling the court enunciates the following principle of law:

"'An agreement to pay a certain sum out of that which one is entitled to receive * * * does not operate as a legal or equitable assignment, since the assignor in either case retains control of the subject-matter.'

"This principle is supported by the following decisions: Cameron v. Boeger, 200 Ill. 84, 65 N. E. 690, 93 Am. St. Rep. 165; Williams v. Ingersoll, 89 N. Y. 508; Thomas v. New York & G. L. R. Co., 139 N. Y. 163, 34 N. E. 877; Story v. Hull, 143 Ill. 506, 32 N. E. 265.

"It is very clear to our minds that, under the analyses made by Mr. Mechem in his work on Agency, appellant, by virtue of the agreement, falls in class 1, which is an agency with bare power, and may be revoked at will, and is always revoked by the death of the principal.

opportunity to exercise the power in order to earn his commission or compensation. Section 138. The third class embraces all agents who have an actual present interest in the subject-matter, and such agencies can be revoked neither by the principal nor death. Section 139.

"The analysis and the principles laid down by Mr. Mechem are fully supported by the leading case of Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 203, 5 L. Ed. 589. The phrase 'coupled with an interest' sufficient to survive death has never been defined more clearly than by Chief Justice Marshall in that case. He says:

"'We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. * * * "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and, therefore, cannot, * * * be said to be "coupled" with it.'

"Appellant cites the case of [illegible] v. [illegible] Trust Co. (C. C. A.) 8 F. (2d) 769, 803, in support of the proposition that, in a suit by an attorney having a contract for a contingent fee to enforce his right against property or a fund, the client is a necessary party. That suit was one by the attorney to establish his fee, in which suit he claimed to be an equitable assignee of a fractional share of the estate. He had contracted with one of the heirs to attack the ancestor's will and to recover the heir's share of the estate, for which the attorney was to receive 50 per cent. of whatever might be recovered in money or in property. He was dismissed by his client, and brought this action, which went to trial, before the action attacking the will was adjudged. His theory was that he had an equitable interest in the funds of the estate in the hands of the executor. The court held that under the contract he was not a legal assignee, and that as an alleged equitable assignee he could not maintain the action without his client. Immediately preceding this ruling the court enunciates the following principle of law:

"'An agreement to pay a certain sum out of that which one is entitled to receive * * * does not operate as a legal or equitable assignment, where the assignor is [illegible] retains control of the subject-matter.'

"This principle is supported by the following decisions: [illegible] v. [illegible], 123 Ill. 84, 68 N. E. 870, 63 Am. St. Rep. 258; [illegible] v. [illegible], 92 N. Y. 607; [illegible] v. [illegible], 138 Pa. 145, 24 W. N. C. 377; [illegible] v. [illegible], 143 Ill. 535, 32 N. E. 268.

"It is very clear to our minds that, under the analysis made by Mr. Mechem in his work on Agency, appellant, by virtue of the agreement, falls in class 1, which is an agency with bare power, and may be revoked at will, and is always revoked by the death of the principal.

"Appellant contends that he has an equitable interest in the stock and dividends by virtue of the Illinois Statutes (Smith-Hurd Rev. St. 1929), c. 13, sec. 14, which relates to attorneys' liens. * * * Even if notice were given, the lien given by the statute is upon only the proceeds of the litigation or settlement of claim. Baker v. Baker, 258 Ill. 418, 101 N. E. 587; Needham v. Voliva, 191 Ill. App. 256. The lien cannot attach until some recovery is had to which it can attach. There is nothing due appellant until a decree of recovery is entered. This is a suit to recover the shares and dividends, and not to enforce a lien upon the recovery. If it were the latter, it would be premature. No authority has permitted an attorney to maintain his client's chose in action in his own interest. Spellman v. Bankers' Trust Co., Executor (C. C. A.) 6 F. (2d) 799."

We are in entire accord with the United States Circuit Court of Appeals in its construction of the meaning and intent of the original and supplemental agreements, and we would regard it as an idle task for us to attempt to add anything to what has been so clearly and convincingly stated in the opinion.

But complainant contends that "whether the written contract alone creates an equitable lien * * * is not here the point. The bill offers to amplify and fortify the claim by the evidence of further facts. * * * One of its primary elements is the claim of an equitable lien and assignment. This is based not alone on the written contract but 'because of the subsequent acts, transactions, appropriations, and course of conduct of, by and between the parties respectively in relation and pursuant thereto, and the pecuniary expenses necessarily incurred by your orator in course of his performance thereof, your orator is in equity the assignee of, and your orator has a lien in equity or an equitable lien * * * upon all the said certificates and shares of stock' etc. These are allegations of essential and ultimate fact, to be derived by the court of equity from the evidence of acts and intent of the parties and the circumstances relating to, or in the course of performance of, the written contract. This claim of rights in equity necessarily tenders and requires evidence for its proof, so it cannot possibly be tested by a demurrer." We have carefully considered the argument of

complainant in support of this contention and find no merit in it. In this connection it must be noted that the amended bill admits that Braun died intestate, and it contains no allegation that he left any written directions in accordance with the last paragraph of the agreement of July 17. To repeat what the court said in Lewis v. Canadian Pacific Ry. Co., supra: "Mr. Braun left neither a will nor written directions, which fact, in our opinion, eliminates from our consideration the provision last referred to. Conversely stated, the provision must, we think, be construed to mean that, if Braun left no directions by will or other writing, then there was no authority to act after his death, unless the written agreement conveyed or granted to Lewis some interest in the subject matter. We think it conveyed no such interest." The court further held that the agency of Mr. Lewis was revoked by the death of Braun. The Railway Company admits, in its brief, that "if there should be a recovery by the administratrix, or if there should be a settlement, it will be the duty of the Railway Company, under the averments of the bill, to protect complainant or subject itself to a separate liability for any amount found to be complainant's rightful fee." Defendant Braun practically concedes that should there be a settlement or a recovery, complainant would have a "claim on a quanto meruit basis for services rendered up to date of Mr. Braun's death."

In the determination of this appeal we have not deemed it necessary to pass upon certain points raised and strenuously argued by defendants in support of the ruling of the trial court.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

36313

20 H

FIRST ACCEPTANCE CORPORATION, a corporation, Appellant,	
v.	APPEAL FROM SUPERIOR
OVERLAND MOTOR COMPANY, a corporation, Appellee.	COURT OF COOK COUNTY.

272 I.A. 605

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dismissing complainant's bill for want of equity.

The bill was filed against M. T. Conrad and Overland Motor Company, a corporation, and alleges that complainant is duly authorized to loan money on automobiles and other motor vehicles and to buy and sell, discount and rediscount commercial paper secured by liens upon automobiles; that on March 30, 1926, a considerable part of its business was making what are known to the automobile trade as "wholesale loans," that is, loans made to retail distributors of motor vehicles to enable them to purchase motor vehicles for cash; that the great majority of automobile sales are made upon deferred payments; that on said date, and for several years prior thereto, M. T. Conrad, doing business as "C. & O. Motor Company," was engaged in the business of selling and distributing motor vehicles at Washington, Tazewell County, Illinois; that he had an agency for the Overland and Wyllis-Knight motor vehicles; that on said date he purchased from defendant, in Chicago, seven Overland and three Wyllis-Knight automobiles and defendant delivered the same to him "in manner hereinafter described," and also delivered to him a receipted

invoice, the purpose of which was to enable him to borrow money from complainant upon automobiles listed therein, and that said automobiles were delivered to him for said purpose; that he borrowed from complainant by reason of said invoice and the delivery of said automobiles to him, and certain notes, trust receipts and bills of sale were made by him in carrying out said purpose; that as to complainant the receipt of the invoice was intended by defendant and Conrad to be a full and complete receipt and acquittance for the amount of said invoice; that said automobiles were described as follows: (here follows a description of the automobiles); that said automobiles were delivered to Conrad by defendant and that it was the intention of the parties to make delivery of all of the automobiles on said date; that Conrad received and drove away one of the automobiles, a Lyllis-Knight sedan bearing serial number 17,204, and that he was free to take all of said automobiles and drive them to his place of business at Washington but was prevented from so doing by an excessive fall of snow which blocked the roads between Chicago and Washington; that on said date Conrad came to complainant's office and applied for a "wholesale loan" upon nine of the automobiles, together with certain others; that he exhibited the receipted invoice and stated that sedan number 17,204 was not to be included in the loan; that complainant, acting upon the receipted invoice and the representations of Conrad and defendant, made to Conrad a loan in the sum of $8,319.15 upon the security of the nine automobiles, together with three others (not now in question); that the loan upon the nine automobiles was $5,792.60; that to evidence the loan Conrad executed two negotiable promissory notes payable to complainant, dated March 30, 1926, in the principal sums of $2,693.45 and $4,825.70, respectively; that he also executed and delivered to complainant two bills of sale, wherein the nine

automobiles were described, and also executed and delivered two documents known as "trust receipts," acknowledging the receipt from complainant of the automobiles in question and acknowledging that he held them as the property of and in trust for complainant; that Conrad paid defendant for said motor vehicles with a check and that the latter accepted the check in full payment and acquittance of Conrad for the purchase price of the automobiles listed in the invoice in so far as the same affected complainant, it having been made for the purpose of obtaining from complainant a loan of money with which to make the check good; that the check was not paid by the drawee bank because of insufficient funds and that a holder thereof subsequent to defendant caused it to be protested for nonpayment and it was returned to defendant unpaid; that because of weather conditions Conrad did not remove the vehicles from the storerooms of defendant within a reasonable time after purchase and at the time the notice of protest reached defendant the nine vehicles were still in storage with it and defendant has since retained the same, although fully advised of the facts set out in this bill and although demand for the possession of the vehicles has been made by complainant on defendant for the purpose of foreclosing complainant's lien against them; that the said notes have not been paid either wholly or in part; that Conrad was adjudged a bankrupt and was indicted, tried and convicted upon a plea of guilty of operating a confidence game and sentenced to serve an indeterminate sentence in the Illinois State penitentiary; that there was a constructive delivery of all of the automobiles by defendant to Conrad and that there was an actual delivery of one of the automobiles; that up to the time of the return of the unpaid check to defendant said automobiles were regarded by the latter as the property of Conrad and he or his vendees were free to

take them from the warehouse of defendant, and during said period said automobiles were held at the risk of Conrad and of complainant; that complainant is advised that defendant claims the nine automobiles as of right, but as between complainant and defendant, the former has the greater equity and should prevail in this action to the extent of its loan upon the vehicles. The bill prays that an accounting may be taken and that defendants or either of them may be decreed to pay complainant whatever sum shall appear to be due it upon the taking of said account, and that in default of such payment the motor vehicles may be sold to satisfy the amount due complainant with costs, and that in case of the sale and of a failure to redeem therefrom, defendants and all persons claiming by, through or under them shall be foreclosed of all right in the vehicles. The bill made M. W. Conrad and Overland Motor Company parties to the proceeding, but although Conrad testified as a witness for complainant, he was not served with a summons and did not enter an appearance, nor an answer, in the cause. While the suit was pending the name of defendant Overland Motor Company was changed to "Willys-Overland, Inc. of Illinois."

The answer of the defendant Willys-Overland, Inc., denies that on March 30, 1926, Conrad purchased from it ten automobiles and states that he ordered ten automobiles from defendant, and that it was understood and agreed between him and defendant that the purchase of the automobiles was not to be completed and the automobiles were not to be delivered until the check given defendant by Conrad was paid; denies that the automobiles or any of them were at any time delivered to Conrad; denies that it ever delivered to him an invoice of any kind for the purpose of enabling him to borrow money from complainant; avers that the invoice delivered to him was delivered in accordance with the usual and customary practice

between wholesale and retail dealers; that the invoice stated upon its face that the automobiles had been paid for by check, and that it therefore showed that the automobiles had not been finally or unconditionally paid for; denies that the invoice was intended to be a full and complete receipt and acquittance for the amount thereof; denies that it was defendant's intention to make delivery of all or any of the automobiles on March 30, 1926, and denies that Conrad received and drove away one of the ten automobiles; denies that he was free to take and drive away the automobiles, or that he had drivers ready to drive said cars away, and denies that he was prevented from so doing by unseasonable weather; avers that he was expressly informed by defendant that he would not be permitted to drive the automobiles away and that they would not be delivered to him until the same were fully and unconditionally paid for and until the check in question had been paid; denies that the check was accepted in payment of the automobiles and avers that it was accepted as mere conditional payment conditioned upon its being paid by the drawee bank; admits that the check was not paid and was protested for nonpayment; denies that the invoice was made for the purpose of enabling Conrad to obtain a loan from complainant with which to make the check good; denies that at the time of receipt of notice of protest the automobiles or any of them were in storage with Overland Motor Company; denies that there was constructive delivery of all or any of the automobiles and denies that there was an actual delivery of one automobile, and further denies that the automobiles or any of them were ever at any time regarded by defendant as the property of Conrad or that he or his vendees were free to receive the same or to take them from the warehouse, and denies that the automobiles were held at the risk of Conrad or complainant; avers that at the time Conrad ordered the automobiles and thereafter they were stored in

Slater's Fire Proof Storage Company, in Chicago, for the account of defendant; that the storage company had issued its negotiable warehouse receipts for the automobiles and that the latter were deliverable only to the order of defendant; that defendant at all times owned the warehouse receipts and that it was expressly understood and agreed between defendant and Conrad that the receipts would not be indorsed or delivered to him until such time as the check delivered by him to defendant had been fully paid.

Complainant states the theory on which it relies as follows: "(a) Defendant accepted Conrad's check in full payment for the automobiles; (b) it was the intention of the parties that the property in said automobiles passed to Conrad upon delivery and acceptance of the check; (c) that Conrad was at liberty to remove the said automobiles from defendant's warehouse and would have removed them, but for the snowstorm; (d) that there was a constructive delivery to Conrad at that time; (e) that, therefore, the automobiles were then and thereafter the property of Conrad; (f) that complainant acquired a valid lien superior to any rights which defendant thereafter might have in said automobiles; (g) that defendant appropriated to its own use property on which complainant had a valid lien and thereby incurred a liability to complainant to account for the value of the automobiles to the extent necessary to satisfy complainant's lien; (h) that defendant, having given Conrad a receipted invoice knowing that it would be exhibited to complainant as evidence of ownership and would be so regarded by it in making a loan, must bear the loss, on the principle that where one of two equally innocent parties must suffer a loss, the loss must be borne by the party whose act made it possible for the loss to occur; (i) the acts and conduct of defendant estopped it to assert title to, or a lien upon the cars

Kinder's Fire Proof Storage Company, in Chicago, for the amount of difference that the storage company had issued the negotiable warehouse receipts for the automobiles and that the latter were deliverable only to the owner of defendant's that defendant at all times owned the warehouse receipts and that it was improperly misplaced and agreed between defendant and claimant that the receipts would not be inserted or existence in the world every time as the claim delivered by him to defendant had been fully paid.

Complainant states the theory on which it relies as follows: "(a) Defendant accepted Gammel's check in full payment for the automobiles; (b) it was the intention of the parties that the property in said automobiles passed to Gammel upon delivery and acceptance of the check; (c) that Gammel was at liberty to remove the said automobiles from defendant's warehouse and would have received them, but for the mistaking (d) that there was a substantial delivery to Gammel at that time; (e) that, therefore, the automobiles were then and thereafter the property of Gammel; (f) that complainant acquired a valid lien superior to any rights which defendant thereafter might have in said automobiles; (g) that defendant appropriated to its own use property on which complainant had a valid lien and thereby incurred a liability to complainant to account for the value of the automobiles to the extent necessary to satisfy complainant's lien; (h) that defendant, having given Gammel a receipted invoice showing that it would be exhibited to complainant as evidence of ownership and would be surrendered by it in making a loan, must bear the loss, on the principle that where one of two equally innocent parties must suffer a loss, the loss must be borne by the party whose act made it possible for the loss to occur; (i) the acts and conduct of defendant estopped it to assert title to, or a lien upon the car

in question."

The theory of defendant is thus stated by it: "(a) That defendant did not accept Conrad's check in full payment for the automobiles, but only as conditional payment; (b) that it was not the intention of the parties that the property in the automobiles should pass to Conrad upon the delivery of Conrad's check; (c) that the defendant expressly refused to deliver to Conrad the negotiable warehouse receipts, which would have permitted the holder to secure the automobiles from the warehouse company, because it did not wish to surrender title of these cars until the check had cleared; (d) that Conrad was not at liberty to remove the automobiles from the defendant's warehouse, and that the failure of Conrad to remove the automobiles was due to the restrictions imposed by defendant, and not to the snowstorm; (e) that there was never any delivery, either actual or constructive, of the cars to Conrad at any time; (f) that the automobiles never became the property of Conrad; (g) that the defendant, by the qualified receipt upon the invoice, told the world that the payment by check was only conditional, and that the defendant was reserving title to the cars; (h) that the defendant had no knowledge that Conrad intended to use the receipted invoice as the basis of a loan; (i) that the defendant, as an unpaid seller in possession of the cars, has a right to retain them as against the world; (j) that no act or conduct of the defendant estopped it from asserting its rights as an unpaid seller in possession, and that the complainant, having closed its eyes to obvious facts, cannot be heard to assert an estoppel against this defendant."

Conrad was a retail dealer in Overland and Willys-Knight cars, at Washington, Illinois, doing business under the name of O. & O. Motor Company. From October, 1923, to March 30, 1926, he

in question."

The answer of defendants is since amended by its: "(a) that defendant did not receive Hammond's check in full payment for the automobile, but only on conditional payment; (b) that it was not the intention of the parties that the property in the automobile should pass to Conrad upon the delivery of Conrad's check; (c) that the defendant expressly refused to deliver to Conrad the negotiable warehouse receipts, which would have permitted him lawfully to secure the automobile from the warehouse company, because it did not make to warehouse title of those receipts the check had already; (d) that Conrad was not an innocent purchaser for value without the defendant's knowledge, and that the failure of Conrad to secure the automobile was due to the willingness displayed by defendants, and not to the assertions; (e) that there was no delivery, either actual or constructive, of the car to Conrad at any time; (f) that the warehouse never became the property of Hammond; (g) that the defendant, by the qualified receipts upon the invoice, held the notes that the payment by check was only conditional, and that the defendants was retaining title to the car; (h) that the defendants had no knowledge that Conrad intended to use the negotiated invoices as the basis of a loan; (i) that the defendants, on an unpaid seller in possession of the car, had a right to retain them as against the vendee; (j) that no act or conduct of the defendants estopped it from asserting its rights as an unpaid seller in possession, and that the complainant, having claimed its rights to retain title, cannot be heard to assert an estoppel against the defendant."

Upon was a trial similar in nature and filing-notice action, at Washington, Illinois, going business under the name of C. A. D. Motor Company. This judgment, 2011, in March 3/, 2011, he

had purchased automobiles from defendant and had financed most of his purchases by means of loans from complainant. Under the method of financing employed up to 1925 he paid defendant ten per cent of his purchases in cash and executed a bill of sale to complainant as a finance company, and defendant then delivered the bill of sale to complainant, accompanied by a draft drawn upon complainant for the balance of the purchase price, and thereupon defendant received a check from complainant in payment of the draft. After 1925 that plan was abandoned and sales were made direct to Conrad. During the period from October, 1923, to March 30, 1926, complainant made approximately 100 loans to Conrad. These loans were of two classes, i. e., wholesale loans made to Conrad upon the cars purchased by him from defendant; and retail loans, which were those negotiated by complainant upon the notes and obligations of those who purchased cars from Conrad at retail. Defendant denied any knowledge of the wholesale loans, but admitted that it was aware that complainant was making retail loans to Conrad. A few days after March 30 legal proceedings were instituted against Conrad in Tazewell county, which resulted in his being forced into bankruptcy. About the same time he was indicted, in that county, for operating a confidence game, plead guilty to the charge, and was sentenced to the penitentiary, where he served nineteen months. Conrad, called by complainant, testified that on March 30, 1926, he bought seven Overland cars and three Willys-Knight cars from the Overland Motor Company's branch; that an employee then made out the invoice for the same and sent it to Mr. Adams, the secretary and treasurer of defendant, and that he, Conrad, at Mr. Adams' desk said: "Well, I have got to call up Mr. Thomas of the First Acceptance and find out if he will handle them or not. * * * Whether he would loan the money on them or not. I don't know

had purchased automobiles from defendant and had financed most of his purchases by means of loans from complainant. Under the method of financing employed up to 1925 he paid outright one per cent of his purchases in cash and executed a bill of sale to complainant as a finance company, and returned then delivered the bill of sale to complainant, accompanied by a draft drawn upon complainant for the balance of the purchase price, and thereupon defendant received a check from complainant in payment of the draft. After 1925 that plan was abandoned and sales were made direct by defendant. During the period from January, 1922, to March 31, 1927, complainant made approximately 300 loans to defendant. These loans were of two classes, i. e., wholesale loans made to defendant upon the note purchased by him from defendant and retail loans, which were those negotiated by complainant upon the notes and mortgages of those who purchased cars from defendant at retail. Defendant denied any knowledge of the wholesale loans, but admitted that it was aware that complainant was making retail loans to defendant. A few days after March 31 legal proceedings were instituted against defendant in Tarrant county, which resulted in his being forced into bankruptcy. About the same time he was indicted, in that county, for operating a conference game, plead guilty to the charge, and was sentenced to the penitentiary, where he served nineteen months thereof, ending by complainant, testified that on March 31, 1926, he bought seven Wrecked cars and three Hillyer-Knight cars from the Cantrell Motor Company's branch; that he employed the same car the invoice for the same and sent it to Mr. Adams, the secretary and treasurer of defendant, and that Mr. Adams, at Mr. Adams' desk said: "Well, I have got to call up Mr. Thomas of the First Acceptance and find out if he will handle them or not. * * * Whether he would loan the money on them or not. I don't know

whether Mr. Adams heard me talk to Mr. Thomas or not. I gave Adams a check for the automobiles and then I went down and got the money. * * * For the amount of the invoice;" that he gave Adams a check for the automobiles for the amount of the invoice; that he talked with Thomas of the Acceptance office on the telephone; that after he gave Adams a check for the amount of the invoice the latter "stamped the invoice 'Paid' and I shook hands with him and bid him good-by and went on;" that he, Conrad, then went to the office of complainant, and the credit manager, after he was shown the invoice, said that the transaction was O. K., and that he, Conrad, then received a check from complainant for the amount of the loan; that he had told Adams that the drivers would be up the next morning for the cars and that the latter said the cars would then be ready for him; that when he talked with Adams on March 30 the latter said that it was a pretty big check that Conrad was giving but that he "had lots like it, so that I guess it is all right;" that Adams asked him if he had the money in the bank to meet the check and that he told him that he had not. The receipt, written in ink on the invoice by Adams, reads as follows: "Paid 3/30/26 Overland Motor Co. G. M. Adams Ok $84." Thomas, the manager of complainant company, testified that on March 30, 1926, he received a telephone call from Conrad, who stated that he was at the defendant company purchasing automobiles at that time and asked him if it would be possible to secure a wholesale loan for about $7,500 on Willys-Knight and Overland automobiles; that he told Conrad that if he would bring the receipted invoices to the office he would take it up; that within two hours Conrad came to complainant's office and "presented the paid invoices and we discussed the matter;" that the witness took Conrad to Mr. Bielefeldt's office and told the latter that the loan would be O. K., and that on the strength of the receipted invoices they made

whether Mr. Jones found me [illegible] Mr. Thomas is well. I gave
Jones a check for the automobile and then I went down and got
the money. * * * For the amount of the involved" that he gave
Jones a check for the automobile for the amount of the involved
that he talked with Thomas of the [illegible] on the [illegible]
[illegible] check for some [illegible] for the amount of the
[illegible] the letter "[illegible] the [illegible] 'that' and I [illegible] [illegible]
with him and did him [illegible] and said, "[illegible] that he, Conrad, then
went to the office of complainant, and the [illegible] manager, after
he was shown the [illegible], said that the transaction was C. O. D.,
and that he, Conrad, then received a check from complainant for
the amount of the loan; that he had held [illegible] that the driver
would be up the next morning for the auto and that the latter said
the car would then be ready for him; that [illegible] be fitted with [illegible]
as stated by the latter said that it was a pretty [illegible] that
Conrad was giving her; that he "had lots like it, so that I guess
it is all right;" that Adams asked him if he had the money in the
bank to meet the check and that he told him that he had not. The
evidence, written in full on the invoice by Adams, reads as follows:
"[illegible] Overland Motor Co., [illegible] - Dr [illegible]." Thomas,
the manager of complainant company, testified that on March 30,
1924, he received a telephone call from Conrad, who asked that
he see at the defendant company [illegible] whether or not
Adams had stated him if it would be possible to secure a [illegible]
loan for about $7,500 on "[illegible]" and "[illegible]"
that he told Conrad that if he would bring the [illegible] involved
to the office he would also if but that [illegible] the [illegible]
come to complainant's office and "presented the [illegible] involved
and he [illegible] the matter;" that the witness [illegible]
Mr. Defendant's office and told the latter that the loan would be
C. O. D., and that on the strength of the [illegible] involved they made

the loan to Conrad for $5,792.60; that Conrad did not tell him that defendant had delivered the cars to him. "Q. Didn't he tell you he already had one car -- A. There was nothing said about what cars he was taking out. We assumed he followed the general practice in taking them all. * * * Q. You say you assumed he was taking them all? A. Yes. Q. On that day? A. Yes. Q. Were you induced to that belief because of anything he said? A. No sir." In reference to the form of the receipt Thomas was questioned as follows: "Q. Now, when this receipted invoice * * * was laid before you, Mr. Thomas, you knew, did you not, that the 'Ck' number 84 represented check number 84? A. Why, I do not know as I did at that particular time. I didn't give it much thought. Q. Then do you mean that you did not know what 'Ck' number 84 signified? A. I did not give it a thought. I can't refresh my memory as to whether I gave that particular notation a distinct thought at that time. * * * Q. Now about the significance and meaning of 'Ck. No. 84,' did you have any doubt as to what it would mean? A. Why, no, I wouldn't have any doubt if I had given it a thought. Q. If you had given it any thought, immediately it would have been brought to your mind that 'Ck No. 84' means check number 84? A. Certainly." Bielefeldt testified that it had "been the practice and policy of the company at any time loans were made to their dealers to call Mr. Adams or Mr. Devaney or some official over there and ask them for the approval, or if they had received an order for that number of cars." He further testified that it was a general practice to call up defendant, whether the receipted invoice was exhibited or not, but that it was not done in all cases. "Q. Do you have any recollection as to whether it was done in this particular case? A. I dont." When this witness was interrogated as to the receipt on the invoice the

following occurred: "Q. * * I draw your attention to the language employed in complainant's exhibit one for identification. Date 3-30-26. Overland Motor Company, G. E. (M.) Adams and Ck. No. 34. That Ck. means check to you? A. Yes, I construed it so." There was no evidence introduced by complainant to the effect that complainant, at the time of the application for the loan by Conrad, made any inquiries of defendant in respect to the transaction. Adams testified that on March 30 Conrad came to his desk with an invoice for ten automobiles and wrote out a check for something over $9,000, and that he said to him: "'Mart, have you got the money in the bank?' * * * and he said, 'Yes.' In view of the fact though that we had never accepted a check of anywhere near that amount from him previously, I told him that those cars were stored at the warehouse, but I would not surrender the receipts to him until this check was cleared. Mart said, 'That is all right, it is bad weather, I could not drive anyhow probably for four or five days, before I can get in.' It was all right with him. Q. Did he at that time tell you that he had to go down and pledge the cars to raise money to pay the check? A. No sir. He said he had the money in the bank." The witness further testified that he had the warehouse receipts for the ten cars at that time in the office; that Conrad did not drive away from defendant's office that day with car number 17,204, a Willys-Knight, described in the invoice; that he did not hear Conrad on March 30 telephone to complainant or anybody asking whether or not the person at the other end of the line would finance nine cars which he had just bought from defendant; that prior to March 30, 1926, Conrad had bought, on a number of occasions, cars "which would have brought the charge, the selling price, around ten thousand dollars," but that on such occasions the cars were paid for by the finance plan;

that the largest number of cars that had ever been sold to Conrad without the use of the finance plan, upon his giving a check, did not exceed $3,000; that Conrad never told him, when he gave his checks for cars, that he would have to go to any finance company to raise money to make good on the checks; that two or three months prior to March 30 Mr. Thomas of complainant company told him that he had cut off all his (Conrad's) credit; that Thomas further told him that Conrad was enjoying a good retail business, that he "sold a lot of cars down there and had a big volume of retail business, which was a nice business," and that Conrad would take paper from the ultimate owner of the car and would in turn rediscount that with complainant corporation; that Thomas never told him that complainant loaned money or was loaning money on receipted invoices; that no invoices save the one of March 30 "carry any reference to a check as the medium of payment;" that on all other occasions a rubber stamp was used to indicate payment; that car number 17,204 was not taken away from defendant's place by Conrad but was delivered by defendant to one of its dealers in South Holland, Illinois, on April 23, 1926; that this car had been unloaded on March 16, 1926, and on the same day placed in Slater's warehouse, the receipt being number 32,352; that the sales company in South Holland sold the car to William Stelter, of Tinley Park, Illinois, on July 23, 1926. Defendant also proved that on March 30 the cars mentioned in the invoice, including number 17,204, were in storage in the public warehouse of Slater & Company and had then been there for a considerable period and were there for some time subsequent to that date; that negotiable warehouse receipts had been issued on the warehouse for the same, which were in the possession of defendant on March 30 and for a considerable period thereafter.

Complainant cites statutes and authorities that bear

that the largest number of cars that had ever been sold in Detroit within the new of the Timmons plan, upon his giving a check, did not exceed $4,000; that Timmons never visit him, nor has he ever dealt for cars, that he would have to go to any Timmons company to prove money to make good on the checks; that one or three months prior to March 20 Mr. Timmons of complainant company told him that he had cut off all his (Timmons's) credits; that Timmons further said that that Timmons was employing a good retail business, that he "had a lot of men down there and had a big volume of retail business, which was a nice business;" and that Timmons would take paper from the citizens among of the city and sell it in turn representing that with sufficient money of the city and sell in turn representing that with sufficient overpayments that Timmons never told him that complainant Insurance agency or the Insurance agency in question knew anything about the fraud or the Insurance agency in question knew anything about the fraud or believe that the one of March 20 "carry any reference to a check on the matter of payment;" that on all other occasions a rubber stamp was used in indicating payment; that our number 17,884 was not taken over from defendant's place by Timmons but was delivered by defendant to one of his drivers in order to collect, Illinois, on April 13, 1922; that this car had been unlocked on March 16, 1922, and on the same day placed in Clair's warehouse, the transfer being number 12,889; that the sales agency in question sold the car in Illinois

Decatur, of Fairy Park, Illinois, on July 20, 1922. Witnesses also proved that in March, 20 the case mentioned in the Leavell, Indianapolis number 17,884, was in storage in the public warehouse of Clair & Company and had then been there for a considerable period and were there for some time afterward; that during that negotiable notes have already had been issued on the warehouse for the same, which were in the possession of defendant on March 20 and for a considerable period thereafter.

Complainant other witnesses and authorities that been

upon cases like the instant one. In applying principles of law to the facts, however, complainant assumes the truth of the evidence produced by it in support of its theory and ignores the evidence introduced by defendant in support of its theory of defense. If the chancellor had believed the testimony of Conrad, the important and essential witness for complainant, and had disbelieved the testimony offered by defendant, he would not have been justified in dismissing the bill, but it is apparent that he disbelieved the testimony of Conrad and believed the testimony offered by defendant, and we think he was fully justified in so doing. In Gray v. Solomon, 338 Ill. 433, 440, the court states:

> "It has always been held that where a decree depended upon the facts and the evidence was heard in open court, the chancellor was in a better position than a reviewing court by reason of his opportunity to observe the witnesses and their demeanor while testifying, and that unless a reviewing court could say the chancellor had palpably decided the case contrary to the evidence his finding would be not disturbed."

In Wiltimore v. Ferry, 171 Ill. 219, 228, the court states:

> "Where the witnesses are produced and examined in open court, the finding of the court will not be disturbed unless the finding is manifestly and clearly against the evidence."

(See also Chechik v. Kolstoky, 311 Ill. 433, 438.) After a careful examination of the evidence we have reached the conclusion that the findings of the chancellor in respect to the facts were fully justified. We are satisfied that we would not be justified in holding that the finding of the court was manifestly and clearly against the evidence. It is clear, we think, that if defendant's theory of fact is sustained by the proof the action of the chancellor in dismissing the bill for want of equity was justified.

Both parties have argued at length as to the effect of the taking of Conrad's check by defendant. The law on the subject is settled. Many Illinois cases might be cited, but we do not deem it necessary to refer to all. In the late case of In re Estate of

upon cross-examination/ one. In applying principles of law to the facts, however, appellants assume the stand of the evidence presented by or in support of the theory and ignores the evidence introduced by respondent in support of the theory of defense. If the appellate court believed the testimony of witnesses, the impeachment was successful without for complainant, and had disbelieved the testimony offered by defendant, he would not have been justified in disturbing the bill, but it is apparent that he disbelieved the testimony of witnesses and believed the testimony offered by respondent, and we think he was fully justified in so doing. In Dyer v. Dyer, 302 Ill. 434, 437, the court stated:

"It has always been held that where a decree pronounced upon the facts and the evidence was heard in open court, the chancellor was in a better position than a reviewing court to judge of his opportunity to observe the witnesses and their demeanor while testifying, and that before a reviewing court would the chancellor's finding be disturbed the mere preponderance of the evidence must be shown to be against it."

In Gallagher v. Dunne, 171 Ill. 438, 442, the court stated:

"Where the witnesses are produced and examined in open court, the finding of the court will not be disturbed unless the finding is manifestly and clearly against the evidence."

Also also Dwight v. Dwight, 211 Ill. 44, 49.) After a careful examination of the evidence we have reached the conclusion that the findings of the chancellor in respect to the facts were fully justified. We are satisfied that we would not be justified in holding that the finding of the court was manifestly and clearly against the evidence. It is clear, we think, that if defendant's theory of fact is sustained by the proof the action of the chancellor in dismissing the bill for want of equity was justified.

Both parties have argued at length as to the effect of the taking of Dorothy's check by defendant. The law on the subject is settled. Many illustrations could be cited, but we do not think it necessary to refer to all. In the late case of In re Estate of

Cunningham, 311 Ill. 311, 316, the court states:

"In the absence of an agreement, expressed or implied, to accept a check as absolute payment, it is simply a means of obtaining payment. Ordinarily it will be presumed that the mere deposit of a check in the usual course of business is for collection, only, and not as money. (Strong & Wiley Bros. v. King, 35 Ill. 9.) Therefore, when Bond stopped payment of the checks and prevented the claimants from receiving their money he rendered ineffective the conditional acceptance of his offer. When the claimants indorsed and deposited the checks tendered by him in full settlement of their claims they accepted his offer on condition that the checks would be paid in due course. (Hearst v. Rhodes, 66 Ill. 351.)"

In the early case of Strong v. King, 35 Ill. 9, 19, the court held that although the bare reception of a check will not, usually, be considered as a payment, but simply as a means of obtaining payment, still it may be shown that the check was, in fact, received as absolute payment, and that such fact may be established by showing an express agreement to that effect, or by showing such circumstances as will satisfy the mind that such was the understanding of the parties at the time the check was taken. Under the facts of the case, as found by the chancellor, the acceptance of the check by defendant cannot be taken as an absolute payment, but must be regarded merely as a conditional payment.

Complainant contends that it was justified in accepting the receipted invoice as a payment and that it had a right to rely upon the receipted invoice as "'evidence of the highest and most satisfactory character' that defendant had received 'money or other thing of value' for cars described in the receipted invoice." As the invoice shows, by the language of the receipt, a conditional payment by check, complainant would not be warranted in treating it as a document evidencing an absolute sale in which payment had been made.

Complainant contends that "the acts and conduct of the Overland Motor Company constitute an estoppel against it to assert title to or a lien upon the cars in question." Under the facts,

Conclusions, III (iii), (iv), the court stated:

"In the absence of an agreement, expressed or implied, to secure a check as security payment, it is simply a means of obtaining payment. Consequently it will be presumed that the mere deposit of a check on the usual course of business is for collection, only, and not as money. Lindsay & Pilcher v. Bank, 25 Gil. 8." Therefore, that court stated proximately of the banks and specifically the plaintiffs from receiving their money be restored individuals the plaintiffs constituted consumers of the civil; then the plaintiffs believed and expected the checks received by them in full satisfaction of their claims they accepted the checks with no condition that the checks might be paid to the drawee.

Cheney v. Lindsay, 46 Ill. 282."

In the early case of Cheney v. Lindsay, 46 Ill. 7, 12, the court held that although the mere transfer of a check will not, ordinarily, be considered as a payment, but simply as a means of obtaining payment, still it may be shown that the check was, in fact, received as qualified payment, and that such fact may be established by showing an express agreement to that effect, or by showing circumstances in this initially the mere fact that such was the understanding of the parties at the time the check was taken. Under the facts of the case, as found by the commission, the acceptance of the check by defendant cannot be taken as an absolute payment, but must be regarded merely as a conditional payment.

Complainant contends that it was justified in accepting the receipted invoice as a payment and thus it had a right to rely upon the receipted invoice as "evidence of the highest and most satisfactory character" that defendant had received "money or other thing of value, for such discharge in the receipted invoice." As the invoice shows, by its language of the receipt, a conditional payment by check, complainant would not be warranted in treating it as a conclusive evidencing an absolute sale in which payment had been made.

Complainant contends that "the acts and conduct of the Overland Motor Company constitute an estoppel against it to assert title to or a lien upon the cars in question." Under the facts

as found by the chancellor, this contention is without merit. We may add that in our judgment complainant was guilty of negligence in its dealings with Conrad on the day in question and that such fact, and not any conduct upon the part of defendant, brought about the loss it has sustained.

Defendant contends and argues with force that it "was an unpaid seller and, as such, under the Sales act, was entitled to a vendor's lien on goods in its possession." In support of this contention defendant cites the following sections of the Sales act, chap. 121a Cahill's Ill. Rev. Stat., 1931:

"Par. 55.) Sec. 52. Definition of unpaid seller.) (1) The seller of goods is deemed to be an unpaid seller within the meaning of this Act -

" * * *

"(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition in which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

" * * *

"Par. 56.) Sec. 53. Remedies of an unpaid seller.) (1) Subject to the provisions of this Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has

"(a) A lien on the goods or the right to retain them for the price while he is in possession of them.

" * * *

"(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage '<u>in transitu</u>' where the property has passed to buyer."

Defendant argues that as it was an unpaid seller by reason of the dishonor of the check in question and as it was in possession of the goods, it, therefore, under the act, had the right to retain the cars against the world. If we are correct in our holding as to the alleged estoppel, it would seem as though there is merit in the instant contention of defendant. In fact, complainant, as we read its brief, has made no serious effort to answer it. It would

as found by the chancellor, this proviso is without merit. It may not also be the judgment enunciated nor quality of major figures in the industry with respect to the duty to quantify and that such fact, but not the amount such the part of defendant, breach after the fact is the proximate.

Defendant contends and argues also that it does not appear that the alleged policy had, or ever, been notified to a vendor's time to grant to the [illegible]. In support of this contention defendant relies the [illegible] opinion of the Ninth Circ., Ellis County's [illegible] Inc., [illegible]:

"Sec. 2(c). Sum. Ch. Definition of unjust or unfair.)
(2) The policy of goods is deemed to be an unjust unfair attitude the dealing of this act -

* * *

"(b) When a [illegible] of merchandise or other commodities shipments has been received on conditional payment, and the condition in which it was received has been broken by reason of the discovery of the shipment, the [illegible] of the buyer, or otherwise.

* * *

"Sec. (4.) Sum. Ch. Immediate of an unjust unfair.)
(2) Contrary to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unjust unfair of goods, or work, has

"(a) A lien on the goods or the right to retain them for the price which is in the possession of them.

* * *

"(d) Where the property in goods has not passed to the buyer, the unjust unfair has, in addition to his other remedies, a right of maintaining a [illegible] action in and [illegible] of his rights of [illegible] and [illegible] 'A [illegible]' where the property has passed to buyer."

Defendant argues that as it was an unjust unfair by reason of the dishonor of the check in question and as it was in possession of the goods, its contention, under the act, had the right to retain the entire purchase the goods. If we are correct in our holding as to the alleged contract, it would seem as though there is merit in the instant construction of defendant. In fact, complainant, as we read its brief, has made no serious effort to answer it. It would

seem, therefore, unnecessary for us to consider the further contention of complainant that "under the facts of the case and the law applicable thereto, title to the automobiles in question passed to the purchaser, Conrad, March 30th, 1926." However, we find no merit in this last contention.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Bridley, J., concur.

among theorists, unanimously fail to be in agreement with Darwinian conservatism of emphasizing that "money the fruits of the sweat and the low capitalistic interest, still in the minimalists, an qualities proved to the productive." Thereby, David stirs, Ricardo. However, we find an moral in this just conclusion.

The desires of the impulsive amount of that money is by difference.

Bibliography

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HEAT UTILITIES CORPORATION,
a Corporation,
(Complainant),

vs.

EUGENE MASSEY, HARRY A. BELL,
UNION BANK OF CHICAGO, Trustee,
JOHN ARNOLD and JOHN W. GOODRUM,
(Defendants) Appellees.

DENIS J. WALSH,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

272 I.A. 605

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Denis J. Walsh from a decree dismissing his intervening petition for want of equity.

Heat Utilities Corporation, a corporation, filed a bill alleging that on December 31, 1929, Eugene Massey, Harry A. Bell, Union Bank of Chicago, trustee, John W. Goodrum, John Arnold and unknown owners, were owners of record of certain premises described in the bill; that complainant installed a certain enterprise oil burner, completed and furnished all the labor and material, and that the work was completed in said building on December 31, 1929; that it subsequently filed its claim for lien within the statutory period, etc. Walsh and Stephen J. Wos each filed an answer in the nature of an intervening petition and also an intervening petition praying that the defendants in the original bill be made parties defendant in their intervening petitions and that they be required to make answer to the same. The intervening petition of Walsh "alleges that he is a general contractor; that the lien of the complainant in this proceeding, Heat Utilities Company, is subordinate to the lien of said Denis J. Walsh; that Walsh made with Eugene Massey and Harry A. Bell an oral contract to furnish labor and material to remodel the premises in question for $3,285.00; that said labor and material were furnished and delivered to said premises; that nothing was paid

[illegible]

[illegible] UTILITIES CORPORATION,
a Corporation,
(Respondent),

vs.

[illegible] ALBERT G. [illegible],
[illegible] ALBERT G. [illegible],
[illegible] and [illegible] J. [illegible],
(Intervening Petitioners).

[illegible] FROM COUNTY COURT
OF [illegible] COUNTY.

[illegible] J. TAYLOR,
Judge.

[illegible]

[illegible] PROCEEDING PETITIONERS HAS RETURNED TO THE [illegible].

This is an appeal by Louis J. Walsh from a decree dismissing his intervening petition for want of equity.

Real Utilities Corporation, a corporation, filed a bill alleging that on December 21, 1930, Tagner Manufg. Co. [illegible], Union Bank of Chicago, trustee, John F. Goodrich, John [illegible] and unknown owners, were owners of record of certain premises described in the bill; that complainant intended a certain enterprise all terms, completed and furnished all the labor and material, and that the work was completed in said building on December 21, 1930; that it subsequently filed its claim for lien within the statutory period, etc. Walsh and Staples J. The said filed an answer in the nature of an intervening petition and also an intervening petition praying that the intervenors in the original bill be made parties defendant in their intervening petitions and that they be required to make answer to the same. The intervening petition of Ralph Wilkins that he is a general contractor; that the lien of the complainant in the proceeding, Real Utilities Company, is subordinate to the lien of said Louis J. Walsh; that Walsh made with Tagner Manufg. Co. [illegible] A. Bell an oral contract to furnish labor and material to remodel the premises in question for $3,250.00; that said labor and material were furnished and delivered to said premises; that nothing was said

on account; that the work began March 2, 1928, was finished August 7, 1930, and that a claim for lien was filed December 6, 1930, in the office of the Clerk of the Circuit Court of Cook County; that Walsh entered into a contract with Wos on April 2, 1928, at the request of Massey and Bell to furnish labor and material for painting and decorating on the premises *** in the amount of $899.25, and that Wos immediately commenced work thereon and furnished the labor and material, which became permanent improvements; that the last work was done August 7, 1930, and that Wos filed his claim for lien on December 6, 1930 in the Recorder's Office of Cook County." Answers were filed by all of the several defendants, save Bell, to the petitions of Walsh and Wos. The master to whom the cause was referred filed a report in which he found:

"That said Dennis J. Walsh entered into said contract with said Harry A. Bell and furnished said labor and material, as claimed in his notice of lien and as alleged in his intervening petition, and that said labor and material became valuable and permanent improvements to said premises; that he has not been paid; that $3,285.00 are due said Dennis J. Walsh from said Harry A. Bell, but I also find that said Harry A. Bell, at the time he entered into the contract with said Dennis J. Walsh, was not an owner of all or any part of said premises described in paragraph numbered 3 of this report within the meaning of the statutes of this State, but was a tenant in possession of said premises; that the title to the same was in said John Arnold for the use of said Eugene Massey; that there was a sort of indefinite installment contract under which said Harry A. Bell had the privilege of purchasing the premises in question, but that he was in default thereunder and was finally evicted from the premises in question by legal proceedings instituted by said Eugene Massey.

"While there is some testimony in this record which tends to show that both Dennis J. Walsh and Stephen J. Wos agreed to take in payment for their labor and material certain lots in the Robinhood Syndicate in lieu of cash, the evidence is not very convincing. Barton, who was a half owner in the Syndicate, testified that the defendant, Eugene Massey, was one of the owners of an undivided fraction of the Syndicate land, and that Bell was one of the salesmen for the Syndicate; that both Walsh and Wos were given credit on the purchase price of certain of these Syndicate lots. But I find that no land of this Syndicate was ever conveyed to Walsh or to Wos and that the credit, if any, allowed to said Walsh and Wos was cancelled in some way not clearly disclosed by the record, and no other provision was made for the payment of the money due to Walsh and Wos.

"The evidence tends to show *** that the enclosure for the porch was completed in June, 1928; basement room in July, 1928; storm windows and screen work in June, 1928; sidewalks in September,

on account that the work began March 7, 1928, the finished report 7, 1930, and that a claim for lien was filed December 1, 1930, in the office of the Clerk of the Superior Court of Cook County; that Yale entered into a contract with Yee on April 2, 1928, at the request of Harry and Bell to furnish labor and material for painting and decorating in the premises now in the amount of $880.25, and that Yee immediately commenced work thereon and furnished the labor and material, which became permanent improvements; that the last work was done August 7, 1930, and that Yee filed his claim for lien on December 6, 1930 in the Recorder's Office of Cook County."

Answers were filed by all of the several defendants, save Bell, to the petitions of Yale and Yee. The master to whom the cause was referred filed a report in which he found:

"That said Bessie J. Yale which subject lien was contracted with said Harry A. Bell and Frederick Bell Judge individually, as alleged in his notice of lien and as alleged in his [illegible] petition, and that said labor and material became valuable and permanent improvements to said premises; that he has not been paid; that $2,[illegible] is due said Bessie J. Yale from said Harry A. Bell, but I find that said Harry A. Bell, at the time he entered into the contract with said Bessie J. Yale, was not an owner of all or any part of said premises described in pleadings numbered 1 of this report within the meaning of the statutes of this state, but was a [illegible] in possession of said premises; that the title to the same was in said John Arnold for the use of said Eugene Harry; that there was a sale of indefinite installment contract under which said Harry A. Bell had the privilege of purchasing the premises in question, but that he was in actual possession and was finally evicted from the premises in question by legal proceedings instituted by said Eugene Harry.

"While there is some testimony in this record which tends to show that both Bessie J. Yale and Stephen J. Yee agreed to take in payment for their labor and material certain lots in the Robinhood Gardens in lieu of cash, the evidence is not very convincing, since, who was a half owner in the premises, testified that the [illegible] Harry, Eugene Harry, the son of the owner of an undivided [illegible] of the premises and that Bell was one of the principals of the Gardens; that both Yale and Yee were given credit for the services of certain of these [illegible]. But I find that the lots of the Gardens was [illegible] in value at the time and that the credit, if any, allowed to said Yale and Yee was considered in some way not clearly indicated by the record, and no other evidence was made for the payment of the money due to Yale and Yee.

"The evidence tends to show that the last lien mechanic for the period was completed in June, 1930; however from July, 1929; storm windows and screen work in June, 1929; plastering in September,

1928; electric work and fixtures in June or July, 1928; stipplework, concrete floor in the basement and steps, in 1928; the trellis work in the fall of 1928; the plastering in April and August, 1928; the trim work in August, 1928; foundations for the garage, in July, 1928; and substantially all of the painting in the spring of 1928. There was some tuck pointing done in May, 1929 but that was not included in the original contract * * *. With the exception of the tuck pointing and the painting hereinafter referred to all of the work was done before October, 1928 *** *. Stephen J. Wos testified * * * that he began his work April 4, 1928. This is confirmed by Wos Exhibit 1 * * * 'which shows the amount of hours and material put in there'; that is to say, on the premises in question. This memorandum, Wos Exhibit 1, was made by Wos every day that he worked and put in that number of hours * * *. The last day shown thereon is April 21, 1928.

"There was some dissatisfaction with the quality of Wos' work and in August, 1930 (Walsh Exhibit 15) Walsh was notified to complete his work; the work was retouching the kitchen. The record shows that there were some spots on the ceiling and on the walls of the kitchen. There is also evidence in this record which tends to show that the average life of a painting job in a kitchen is two or three years, depending upon how much smoke and dirt there is * * *.

"I find that the work which Wos, by direction of Walsh, completed August 7, 1930 was in the nature of separate repair work not included in the original contract for remodelling entered into in March, 1928, and was of an inconsequential character and rather in the nature of new and repair work.

"I further find that the notice of lien filed by said Dennis J. Walsh on December 6, 1930 and the answer in the nature of an intervening petition filed on February 2, 1931 in his behalf as an original contractor were filed too late to comply with the requirements of the statutes of this State.

"I further find that the labor and material of said Stephen J. Wos which he furnished as a sub-contractor of said Dennis J. Walsh under the contract for remodelling of March, 1928 were completely furnished during the spring or summer of 1928. The work of Stephen J. Wos furnished August 7, 1930 as above found was of a trivial and inconsequential character and rather in the nature of new and separate work. It may be regarded as an attempt to revive liens. No evidence has been introduced in this record to show the value of the labor and material furnished in August, 1930.

"By the terms of the contract of 1928 Wos was to do housecleaning, painting and decorating by the hour. No notice of this contract was ever served on said Bell, Massey, Goodrum or Arnold * * *. There is no showing in this record that Dennis J. Walsh as a general contractor gave any written statement to the owners of the premises under Section 5 of the Lien Act of this State, giving the names of all parties furnishing labor and material and the amounts due and to become due to each.

"I further find that the notice of lien filed by said Stephen J. Wos as a sub-contractor of said Dennis J. Walsh, and the answer in the nature of an intervening petition of said Wos, filed February 2, 1931, were filed too late to protect the lien of said Wos as a sub-contractor for the work and materials furnished for the premises in question under the 1928 contract. Said Wos

1928; electric work and fixtures in June or July, 1929; ventilators, exterior floor in the basement and stoves, in 1928; the boiler was in the fall of 1929; the plastering in April and August, 1929; the brick work in August, 1929; foundations for the garage, in July, 1928; and substantially all of the painting in the spring of 1929. There was some work during June in May, 1928 but that was not included in the original contract * * *. With the exception of the work painting and the installing mortgaged referred to all of the work was done before October, 1928 * * *. Subpoena ii.Mat begining * * * also he began his work April 4, 1928. This is confirmed by the Exhibit 1 * * * which shows the amount of hours and actually put in there'; that is to say, on the premises in question. This statement, the Exhibit 1, was made by Tom Moore that was by varied and put in that amount of hours * * *. The last day shown therein is April 27, 1928.

"There was some disagreeablenes with the quality of that work and in August, 1928 (Exhibit 12) Malan was entitled to demand the work; the work was refusing the Elkins. The reason Elkins first gave was some spots on the ceiling and on the walls of the dining. There (Exhibit 9) Elkins testified that he was the average life of a painting job in a kitchen is two or three years, depending upon the work done and that there is * * *.

"I find that the work which Tom, by direction of Malan, completed August 7, 1928 was in the nature of separate extra work not included in the original contract for remodeling entered into in March, 1928, and was of an immaterial character and rather in the nature of new and repair work.

"I further find that the moving of line fixed by said Dominic J. Malan on December 6, 1926 and the moving in the nature of an improvement position fixed on February 2, 1928 in his behalf as an original contractor were fixed too late to comply with the requirements of the statutes of this State.

"I further find that the labor and material of said Moore in J. Wu worked on a sub-contractor of said Dominic J. Malan under the contract for remodeling of barn, 1928 were improperly furnished during the spring or summer of 1929. The work of Stephen J. Wu finished August 7, 1928 is more fixed was of a trivial and inconsequential character and rather in the nature of new and separate work. It may be regarded as an attempt to revive liens. No evidence has been introduced in this record to show the value of the labor and material furnished in August, 1928.

"By the terms of the contract of 1928 for was to do house-cleaning, painting and decorating by the Moore. In notice of this contract was ever served on said Hall, Harvey, Moore or Arnold * * *. There is no evidence in this record that Dominic J. Malan or general contractor ever any written statement to the owners of the premises under Section 2 of the lien act of this State, giving the names of all persons furnishing labor and material and the amounts due and to become due to each.

"I further find that the notice of lien filed by said Stephen S. Wu as a sub-contractor of said Dominic J. Malan, and the answer in the nature of an interpleading petition of said Harvey S. Hall, were filed too late to prevent the lien of said Wu as a sub-contractor for the work and materials furnished for the premises in question under the 1928 contract. Said Wu

has testified that the amount due him for said labor and material is the sum of $899.25 and that he has never received any money * * *. I find that said Dennis J. Walsh and/or said Harry A. Bell owe said Stephen J. Wos $899.25.

"I further find that irrespective of any other defenses, said Dennis J. Walsh and Stephen J. Wos have failed to prove that any owner, of all or of any part of the premises described in paragraph numbered 3 of this report, or of any interest therein (except the interest of said Harry A. Bell, if any, as a tenant), ever contracted with said Dennis J. Walsh and Stephen J. Wos, or either of them, for the remodelling of said premises, and said Dennis J. Walsh and Stephen J. Wos have failed to prove that any such owner of all or of any part of said premises, or of any interest therein (except the said interest of said Harry A. Bell) ever knowingly permitted the said labor or material to be furnished as said Walsh and Wos have alleged.

"The complainant herein, Heat Utilities Corporation, a corporation, offered no proof in support of the allegations in its bill of complaint. I recommend that the bill of complaint be dismissed.

"I further find that on December 2, 1930 the defendant, John W. Goodrum, became a purchaser for value of the premises in question without notice of the claims for lien of the said Stephen J. Wos and said Dennis J. Walsh."

The master recommended that the bill of complaint of Heat Utilities Corporation, a corporation, and the intervening petitions of Walsh and Wos be dismissed, and the chancellor entered a decree in strict accordance with the findings and recommendation of the master. Neither the complainant, Heat Utilities Corporation nor the intervening petitioner Wos appealed from the decree.

The intervening petitioner Walsh, appellant, contends (a) "The rule is now well settled that an owner will be subjected to a lien in favor of the contractor whose contract is not with the owner but with one whom such owner has knowingly permitted to contract for the improvement of or to improve the premises: Eugene Massey, the owner, knowingly permitted Harry Bell, his agent, to cause Denis J. Walsh, the general contractor, intervening petitioner, to install the improvements in the premises in question, and thereby subjected the interest of the owners in the real estate to a mechanic's lien under Section 1 of the lien law of Illinois." (b) "Even if an owner does

has stipulated that the amount for sale (or that that labor not actually in the form of lien, is not yet to be paid) should be deemed any money * * *. I find that this claim should, Walsh under said Henry A. Hall was said respondent, the plaintiff.

"I further find that that interpretive of any right determined, said Dennis I. Walsh and respondent I. The same failing to prove that any remedy, of all or of any part of the premises described in petitioner's complaint, or of this property, or of any interest therein (without the interest of said Harry A. Hall, if any, as a lienholder, was established with said Dennis I. Walsh and respondent I. The, as alleged of claim, for the remodeling of said premises, and said Dennis I. Walsh and Stephen A. The have failed to prove that any such owner or his or of any part of said premises, or of her interest therein (except the said interest of said Harry A. Hall) ever constituted the said labor or material is to be furnished on said Walsh not the same alleged.

"The complainant herein, Sam Utilities Corporation, a corporation, offered no proof in support of the allegations in the bill of complaint. I recommend that the bill of complaint be dismissed.

"I further find that as December 8, 1930 the defendant, John F. Stephen, became a purchaser for value of the premises in question without notice of the claim for lien of the said claimant D. The son said Dennis I. Walsh."

The master recommending that the bill of complaint of Sam Utilities Corporation, a corporation, and the intervening petitions of Walsh and Wa be dismissed, and the chancellor entered a decree in strict accordance with the findings and recommendation of the master. Entering the decree, Judge Utilities Corporation for the intervening petitioner Walsh appealed from the decree.

The intervening petitioner Walsh, appellant, contends (a) "The rule is now well settled that an owner will be subjected to a lien in favor of the contractor where contract is not with the owner but with one when such owner has lawfully permitted to contract for the improvement of or to improve the premises: Suppose Henry, the owner, lawfully permitted Harry Hall, Bill Ayers, to cause Dennis I. Walsh, the general contractor, intervening petitioner, to install the improvements in the premises in question, and thereby subjected the interest of the owners in the real estate to a mechanic's lien under Section 1 of the lien law of Illinois." (b) "Even if an owner does

not know of the existence of a contract, nevertheless, if he has knowledge of the making of the improvements and allows them to proceed, then the owner or owners' interest in real estate is subject to a mechanic's lien." (c) "Eugene Massey, the landlord knowingly permitted his tenant, Bell, to make improvements in the premises during his occupancy of same by permitting Harry Bell to contract for such improvements with Denis J. Walsh, the intervening petitioner. The improvements enhanced the value of said premises, and the owners, through Bell's acts, were immensely benefited by such improvements made by Walsh in said premises. Neither of the owners objected or protested; neither did their agent or tenant, Bell, object; but by their acts consented to the improvements and thereby assented to the premises in question being subjected to a mechanic's lien in favor of Walsh, the intervening petitioner." These contentions have been forcibly and ably argued by the present counsel for appellant. After an exhaustive study of the evidence we have reached the conclusion that justice requires a retrial of this cause. The trial solicitor for appellant, in our judgment, seriously erred in not calling to the stand certain witnesses, notably Bell and Goodrum, and he failed to subject defendants' witnesses to a proper cross-examination. As this cause may be tried again, we purposely refrain from analyzing and commenting upon the evidence. We may say, however, that there are certain salient facts in the case that indicate plainly to us that the unfortunate appellant, whom defendants concede furnished labor and materials to the amount of $3,285, "which became valuable and permanent improvements to said building" and for which he has not been paid, should have another opportunity to properly present his case. We are satisfied that it would amount to a miscarriage of justice to hold otherwise. From anything we have said, we do not wish to be understood as

any part of the existence of a contract, nonfulfillment, if he has knowledge of the making of the interpretation and adopts them as phrased. Thus the court of appeals' judgment is real errors in applying to a contractor's liens." (c) "Employee earning, the lien-land commission constituent air debtor, fail, in some instruments in the previous notice air knowledge of land by possibility duty fail to contract for such interpretation qlik Dwds 1. Yalin, the interpreting publisher. The interpretation concerned the value of said property, and the owners, through Bell's acts, were immediately benefited by such improvements made by Yalin in said property. Either of the acts specified is prohibited, whether the debtor agent or banker, Bell, objects; not by their acts commerical to the interpretation and Kiandy assented to the commission in question being subjected to a mechanic's lien in favor of Yalin, the interpreting publisher." These contentions have been fatally and duly argued by the present counsel for appellant. After an exhaustive study of the evidence we have reached the conclusion that justice requires a retrial of this cause. The trial solicitor for contractor, in our judgment, erroneously erred in not calling to the stand certain witnesses, namely Bell and wife, and Ke Fallin to subject defendants' witnesses to a proper cross-examination. In this cause may be tried again, we purposely refrain from analyzing and commenting upon the evidence. We may say, however, that there are certain salient facts in the case that indicate plainly to us that the unfortunate appellant, when defendants commenced furnished labor and materials to the amount of $3,000, "value beyond valuable and permanent improvements to said building" and for which he has not been paid, should have another opportunity to properly present his case. We are satisfied that it would amount to a miscarriage of justice to hold otherwise. From anything we have said, we do not wish to be misterpreted as

intimating that the master in chancery who heard the evidence acted unfairly.

We have considered two technical points raised by defendants in support of the decree, but we find them without merit.

The decree of the Circuit court is reversed and the cause is remanded with directions to the chancellor to have the cause again referred to a master for a hearing de novo.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

indicating that the market is observing who bears the original moral culpability.

To have maintained the immoral policy viewed by defendants in support of the lawsuit, but at that time without merit.

The issues of the client's work is covered not the same is reported with disclosure to the Commission to have the model again referred to a hearer for a function as case.

[illegible] not [illegible] [illegible] [illegible].

Quizzes, i. i., and [illegible], i., [illegible].

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MAE STEELE HOWELL, Administratrix of the estate of MARTIN A. HOWELL, deceased,
Appellant,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

272 I.A. 605

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case, an action in assumpsit, was tried by a jury, and at the close of the evidence the trial court, upon motion of defendant, instructed the jury to return a verdict in its favor. Plaintiff appeals from a judgment entered upon the verdict.

The case was tried upon plaintiff's second amended declaration, containing two counts. The first count alleges, in substance, that defendant on October 1, 1925, at New York City, made and executed its certain instrument in writing, commonly known as a five year term policy of life insurance on the life of Martin A. Howell, designating Mae Steele Howell as the beneficiary, the policy being for a good and valuable consideration paid by him to defendant and thereafter duly delivered to him, and thereby, by said policy, promised and agreed to pay to Martin A. Howell, upon his death, the sum of $25,000, payable upon the terms and conditions of the policy of insurance; that on October 1, 1930, Martin A. Howell had duly paid all premiums contemplated by the said policy and had duly performed all other conditions thereunder by him required to be performed; that Charles Wadsworth was

the general agent of defendant at Chicago, Illinois, and was at all of said times clothed with the general power on behalf of defendant to solicit insurance, receive and forward applications for insurance, receive and deliver policies of insurance, and collect premiums thereon; that during the life of the policy issued October 1, 1925, Wadsworth, as general agent of defendant, notified Howell of the approaching expiration date of the policy and requested him to apply for a new policy, so as to preclude the possibility of the old policy expiring before new insurance should be secured and so as to give Howell continuous insurance protection on his life; that to this end, on October 2, 1930, Howell made formal written application to defendant for insurance on his life in the sum of $20,000, payable to his estate, said application being designated as Part I thereof; that the application, among other things, provided that the policy to be issued on the application should not take effect until the first premium had been paid during the applicant's good health, and that no agent or other person except the president, a vice-president, the secretary, the treasurer, or a registrar of defendant should have power to waive any of defendant's rights or requirements and that no waiver should be valid unless in writing signed by one of the foregoing officers; that shortly thereafter and practically coincident with the making of the application, the applicant delivered the same to defendant through its duly authorized general agent as aforesaid at Chicago; that at the time of delivery by applicant to defendant of the application and practically coincident with the delivery, Howell also delivered to defendant, through its said agent, at the place aforesaid, his personal check for $99.90 in favor of defendant's said agent for the account of defendant, which check was received by defendant in payment of the first installment of the original premium contemplated by the terms of

the general agent of defendant at Chicago, Illinois, and was an all of said times dealing with the general group on behalf of defendant to policies insurance, received and issued application for insurance, received and delivered policies of insurance, and failed gaumann thereby that during the life of the policy issued October 1, 1929, therefore, on general agent of defendant, notified Howell of the approaching expiration date of the policy and requested him to apply for a new policy, so as to preclude the possibility of the old policy expiring before new insurance should be received and so as to give Howell continuous insurance protection on his life; that to this end, on October 2, 1929, Howell made formal written application to defendant for insurance on his life in the sum of $20,000, payable to his estate, said application being transmitted to that I understand that the application, usually after taking, provided that the policy to be issued on the application should not take effect until the first premium had been paid during the applicant's good health, and that no agent or other person could vary the provisions a phrase-ology, the accuracy, the transfer, or a rejection of defendant would have power to waive any of defendant's rights or requirements nor that no waiver should be valid unless in writing signed by one of the foregoing officers; that shortly thereafter and immediately notwithstanding with the mailing of the application, the applicant received the same to defendant through its duly authorized general agent to ascertain as thought that at the time of delivery by applicant to defendant of the application and previously without with the activity, Howell also delivered to defendant, through the said agent, at the time aforesaid, his personal check for $20.00 in favor of defendant's said agent for the account of defendant, which check was received by defendant in payment of the first instalment of the original premium contemplated by the terms of

the application and in accordance with the requirements of defendant in this particular connection; that at the time of delivery of the check, and practically coincident therewith, defendant through its said agent delivered to applicant a receipt for the said premium in the following form:

"Received of .....
Dollars, the first .....annual premium on proposed insurance for $.....on the life of.....for which an application bearing a corresponding number as above is this day made to The Equitable Life Assurance Society of the United States. Insurance, subject to the terms and conditions of the policy contract, shall take effect as of the date of this receipt, provided applicant is on this date in the opinion of the Society's authorized officers in New York, an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount and at the rate of premium applied for; otherwise the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt.

Dated at .....19 ... .
Agent."

that at the time of the making of his application for insurance applicant was given a medical examination by one of the duly authorized medical examiners of defendant on the latter's behalf and on its authorization; that at the time and place aforesaid applicant delivered to one of the duly authorized representatives of defendant a declaration in the way of answers to printed questions on a form supplied by defendant and designated as Part II of said application, and bearing upon, among other things, the past medical history of applicant; that the answers in said declaration or Part II of said application, as aforesaid, were truthfully answered by applicant; that at the said time and place applicant, at defendant's instance

the application and in accordance with the requirements of statutes in this particular connection; that at the time of delivery of the policy, and practically uninterrupted thereafter, defendant insured the said Grace Kirkpatrick to applicant, a policy for the sum payable in the following form:

"Received of .....

Dollars, the first ..... annual premium on proposed insurance for $.....on the life of.....for which an application bearing a corresponding number as above is this day made to The Equitable Life Assurance Society of the United States. Insurance, subject to the terms and conditions of the policy contract, shall take effect as of the date of this receipt, provided application is on file date in the opinion of the Society's authorized officers in New York, an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount and at the rate of premium applied for; otherwise the liability assumed by this receipt shall be returned on demand and the surrender of this receipt.

Dated at .....this ... ."

that at the time of the making of his application for insurance applicant was given a medical examination by one of the duly authorized medical examiners of defendant on the Society's behalf and on its authorization; that at the time and place aforesaid applicant delivered to one of the duly authorized representatives of defendant a statement in the nature of answers to printed questions on a form supplied by defendant and designated as Part II of said application, and thereby, among other things, the part defining material of applicant; that the answers in said questionnaire as Part II of said application, as signed, were truthfully answered by applicant that at the said time and place applicant, at defendant's instance

and request, delivered to defendant, as aforesaid, a specimen of his urine for examination by defendant in connection with said application; that thereafter the application, including the declaration aforesaid, together with the specimen of urine were forwarded to the main office of defendant in New York city by a duly authorized Chicago representative of defendant; that the declaration and the specimen were received in the office of defendant at New York on October 3, 1930; that thereafter the same were referred by defendant's New York representatives to the medical department of defendant at that point, where it was rated as a "committee case," that a microscopical examination of applicant's specimen of urine was thereupon made under the directions of defendant's authorized New York officers; that the examination revealed impairments and was reported and recorded by these officers as revealing such impairments; that on October 7, 1930, defendant, at the instance of its New York authorized officers aforesaid, telegraphed to its Chicago representatives for a second specimen of applicant's urine; that this second specimen was received by defendant in New York on October 14, 1930, and on said date was brought to the attention of its said authorized officers; that a microscopical examination of the said second specimen was made under the directions of these officers on that day and this examination likewise revealed impairments and was reported and recorded by these officers as indicating such impairments; that on October 15, 1930, defendant, under the directions of its said authorized New York officers, telegraphed its Chicago agents for a third specimen of applicant's urine; that nothing further was done by the said authorized New York officers in the connection referred to so far as communicating with the Chicago office of defendant is concerned, until November 5, 1930; that on that day they requested information by mail of the said Chicago office as

duly they requested information by mail of the said Chicago office as
office of defendant is concerned, until November 8, 1939; that on that
the communication referred to so far as communicating with the Chicago
nothing further was done by the said authorized New York officers in
Chicago agents for a third specimen of applicant's mixture; that
directions of the said authorized New York officers, telegraphed the
such information; that on October 12, 1939, defendant, under the
mixture for examination by defendant in connection with said
application; that concerned the application, including the
"character-structure", together with the specimen of mixture were
forwarded to the main office of defendant in New York city by a
duly authorized Chicago representative of defendant; that the
description and the specimen were received in the office of defendant
in New York on October 2, 1939; that thereafter the same were
referred by defendant's New York representatives to the medical
department of defendant at that place, where it was stated as a
"matter fact," that a microscopical examination of applicant's
specimen of mixture was made under the direction of defendant's
authorized New York officers; that the examination revealed
impurities and was rejected and returned by these officers as re-
vealing such impurities; that on October 7, 1939, defendant, at the
instance of its New York authorized officers aforesaid, telegraphed
to its Chicago representative for a second specimen of applicant's
mixture; that this second specimen was received by defendant in New
York on October 14, 1939, and on said date was brought to the atten-
tion of its said authorized officers; that a microscopical examination
of the said second specimen was made under the directions of these
officers on that day and this examination likewise revealed impuri-
ties and was rejected and returned by these officers as containing
such impurities; that on October 18, 1939, defendant, under the
directions of its said authorized New York officers, telegraphed its
Chicago agents for a third specimen of applicant's mixture; that
nothing further was done by the said authorized New York officers in
the connection referred to so far as communicating with the Chicago
office of defendant is concerned, until November 8, 1939; that on that
day they requested information by mail of the said Chicago office as

to the then status of the case; that nothing further was done by said officers in the connection referred to as aforesaid, until November 15, 1930, and after the death of Howell, which had occurred on November 11, 1930; that on November 15, 1930, the New York officers of defendant entered an order on its records purporting to reject the insurance in question; that on November 11, 1930, the death of Howell was known to Wadsworth, the agent of defendant, and the aforesaid authorized officers of defendant in New York knew of the applicant's death at the time of the purported rejection of the insurance, and plaintiff alleges in this connection that the said duly authorized New York officers of defendant were induced to attempt to reject the insurance because of the fact that applicant had theretofore died; that the information in connection with applicant's right to insurance under the application in question was peculiarly within the control and possession of defendant at all times from and after October 3, 1930, when the application, declaration and first specimen of urine were brought to its attention at its New York office; that the check delivered by the applicant to defendant on October 2, 1930, was predated October 1, 1930, and carried on its face, on the date of its delivery to defendant and at all subsequent times involved herein, the expression "New 5 year term policy starting today"; that the said expression was in the handwriting of applicant; that from the fact that the check was predated, as aforesaid, and carried the expression referred to in applicant's own handwriting, and from the fact that the insurance that applicant had carried with defendant under the policy dated October 1, 1925, had expired on September 30, 1930, defendant knew that applicant's intention in making the application herein involved was to secure continuous insurance on his life and that he expected so to do; that defendant possessed no other or different information on October 7, 1930, or

on October 14, 1930, when microscopical examinations of applicant's urine were made under the directions of the New York officers, than they possessed on November 15, 1930, when they made an attempt to reject the insurance; that on October 7, 1930, and on October 14, 1930, and during all of the period thereafter to the time of applicant's death and to the time of defendant's receiving information thereof, the said authorized New York officers of defendant knew, or should have known, that they had the right, on October 7, 1930, and on October 14, 1930, under defendant's rules and the application and receipt involved herein, to reject the said application without defendant incurring any liability thereunder for so doing; that on October 9, 1930, defendant cashed the said check and on that day took the proceeds thereof into its accounts; that on October 9, 1930, and thereafter during the entire period up to the time of applicant's death, and up to the time defendant received notice of his death, defendant and its general agent at Chicago knew of the provision in the application to the effect that the policy was not to be effective until the first premium thereunder had been paid during the good health of the applicant, and knew of the provision in the receipt to the effect that the insurance in question was to take effect from the date of the said receipt only in the event that applicant was on its date, October 2, 1930, in the opinion of defendant's authorized New York officers, an insurable risk under its rules, and otherwise acceptable on the plan and for the amount and at the rate of premium applied for; that at all of said times defendant and its said general agent knew of the provision in the application hereinbefore referred to, to the effect that no agent or other person except the president, a vice-president, the secretary, the treasurer, or a registrar of defendant

on October 14, 1919, then determined conditions of applicant's estate were such under the direction of the vice that officers, that they possessed on November 14, 1920, when they made an attempt to repeal the insurance; that on October 7, 1920, and on October 14, 1920, and during all of the period thereafter to the time of applicant's death and to the time of defendant's avoiding payment thereof, the said relationship of the vice that officers of defendant knew, or should have known, that they had the right, on October 7, 1920, and on October 14, 1920, under defendant's rules and the applications and policies involved herein, to repeal the said application without obtaining insurance only IMMEDIATELY thereafter for no reason; that on October 9, 1919, between either the 14th which had on that day took the present insured in his accounting; that on October 9, 1920, was therefore during the entire period up to the time of applicant's death, and up to the time defendant received notice of his death, defendant and its general agent at Chicago knew of the provision in the application to the effect that the policy was not to be effective until the first premium thereunder had been paid during the good health of the applicant, and knew of the provision in the receipt to the effect that the insurance in question was to take effect from the date of the said receipt only in the event that applicant was on the date, October 9, 1920, in the opinion of defendant's medical examiner for this district, an insurable risk under its rules, and otherwise acceptable to the plan and for the amount and at the rate of premium applied for; that at all of said times defendant and its said general agent knew of the provision in the application hereinbefore referred to, to the effect that no agent or other person except the president, a vice-president, the secretary, the treasurer, or a director of defendant

should have power to waive any of defendant's rights or requirements, and knew of the provision therein contained that no waiver should be valid unless in writing, signed by one of the foregoing officers, and defendant and its said general agent at all of said times knew that if the latter did not have actual power to waive these provisions they would be effective to prevent a waiver thereof; that the cashing of the said premium check and the taking of the proceeds into the accounts of defendant, and the continuous retention by defendant of the money proceeds thereof as the premium from that date until after the death of applicant when the New York officers of defendant knew, or should have known, that they had the right on October 7, 1930, and on October 14, 1930, under said application and receipt, to reject applicant without subjecting defendant to any liability thereunder, warrant the inference that defendant voluntarily relinquished its right to insist on the provisions of the said application to the effect that only certain officers of defendant had the power to waive any of defendant's rights or requirements, and that it voluntarily relinquished its right to insist on the provisions of the said application that the insurance should not take effect until the first premium thereunder had been paid during the good health of applicant; that it voluntarily relinquished its right to insist on the provisions of the said receipt that the insurance was to take effect only in the event that applicant was on its date an insurable risk in the opinion of its authorized New York officers, and that it voluntarily relinquished its right to reject the application and insurance involved herein, and by virtue of the aforesaid facts and the fact that defendant delayed an unreasonable length of time under the circumstances in attempting to reject applicant, when under such circumstances it was its duty promptly to reject applicant, and by reason of the fact that it did on November 15, 1930,

should have power to waive any of defendant's rights or requirements, and know of the provision therein contained that no waiver should be valid unless in writing, signed by one of the foregoing officers, and defendant and the said general agent at all of said times knew that if the insured did not have actual power to waive those provisions they could be effective to prevent a waiver thereof; that the reading of the said proofs was the taking of the proofs into the records of defendant, and the continuous retention by defendant of the money proceeds thereof as the premium from that date until after the death of applicant when the New York officers of defendant knew, or should have known, that they had the right on October 7, 1907, and on October 14, 1907, under such application and receipt, to reject application without refunding anything to my client, and by reason of the fact that it did on November 13, 1910, rightfully exercise its right to insist on the provisions of the said application to the effect that only certain officers of defendant had the power to waive any of defendant's rights or requirements, and that it voluntarily relinquished its right to insist on the provisions of the said proofs that the insurance was to take effect only in the event that applicant was on its date an insurable risk in the opinion of its authorized New York officers, and that it voluntarily relinquished its right to reject the application and insurance herein, and by virtue of the above-said facts and the fact that defendant delayed an unreasonable length of time under the circumstances in rejecting or refusing applicant, when under such circumstances it was its duty promptly to reject applicant, and by reason of the fact that it did on November 13, 1910,

attempt to reject applicant upon such information only as it already possessed on October 7, 1930, and October 14, 1930, defendant, through its duly authorized agents did, in fact, waive each and all of the provisions of the application and receipt, and did, in fact, waive its rights to reject the application and the insurance. The count further alleges that after learning of the death of applicant, as aforesaid, defendant refused to issue the policy referred to in the application and denied liability for any insurance on applicant's life; that defendant has been definitely and duly advised in writing by plaintiff of the death of applicant and defendant continues to deny liability, and has refused to furnish plaintiff with a form of the policy involved and has refused to supply plaintiff with the printed forms to enable her to make proofs of loss in connection with her claim for insurance. The count further alleges that defendant, upon receiving notice of the death of Howell, became liable to pay to applicant's estate the sum of $20,000, contemplated by the terms of the application, together with interest thereon at the rate of five per cent from the time defendant was first notified of the death of Howell, and being so liable defendant, for the consideration indicated at the place stated and at the time of the aforesaid waiver, and at the time of entering into the preliminary contract aforesaid, promised to pay to applicant's estate the aforesaid sum of money, and defendant has hitherto wholly neglected and refused to pay the same or any part thereof, to the damage of plaintiff in the sum of $25,000. Wherefore, etc. The second count is a repetition of the first count as regards the matters of inducement, the application, the delivery of the binder receipt, the payment of the premium, the medical examination and requests for further specimens of applicant's urine. It omits the allegations as to waiver set up in the first count and makes additional allegations

attempt to replace applicant upon such information only as it already possessed on October 7, 1970, one October 14, 1971, defendant, through its duly authorized agents did, in fact, waive such and all of the provisions of the application and receipt, and did, in fact, waive its rights to point the application and the insurance. The court further alleges that after learning of the lack of qualifications, as aforesaid, defendant refused to issue the policy referred to in the application and cannot disclaim the say insurance in qualified, fully that defendant has been definitely and duly notified in writing by plaintiff of the death of applicant and referred coverage in duty liability, and has refused to reimburse plaintiff with a form of the policy involved and has refused to supply plaintiff with the printed form to enable her to make proofs of loss in connection with her claim for insurance. The court further alleges that defendant, upon receiving notice of the death of Donald, because liable to pay to plaintiff's father the sum of $50,000, contemplated by the terms of the application, together with interest thereon at the rate of five per cent from the time defendant was first notified of the death of Donald, and being in liable defendant, for the consideration indicated on the place above and at the time of the aforesaid order, and at the time of entering into the previously mentioned aforesaid, promised to pay to applicant's owners the aforesaid sum of money, and otherwise has diligently duly performed to pay the same or any part thereof, to the damage of plaintiff in the sum of $50,000. Therefore, etc. The second count is a repetition of the first count in regards the matrix of insurance, the application, the delivery of the binder receipt, the payment of the premium, the medical examination and requests for further questions of applicant's mother. It omits the allegations as to waiver and up in the first count and makes additional allegations

that on October 15, 1930, a third specimen of urine was requested of defendant's Chicago office by its New York officers; that nothing further was done by the latter in the way of communicating with the Chicago office until November 5, 1930; that on that day they requested, by mail, information of the Chicago office as to the then status of the case; that nothing thereafter was done until November 15, 1930, when the said New York officers entered an order on their records purporting to reject the insurance in question; that on November 12, the death of the applicant was known to defendant and it was induced to reject the insurance because of the fact that the applicant had theretofore died; that had it not been for his death defendant would not have attempted to make the rejection; that the New York officers of defendant were of the opinion, prior to learning of the death of applicant, that he was an insurable risk on the date of the application and that the application was otherwise acceptable under the rules of the Society; that from the fact that the check was predated October 1 and carried the expression on its face "New 5 year term policy starting today" in the handwriting of the applicant, and from the further fact that the insurance that applicant had been carrying with defendant under the five-year term policy dated October 1, 1925, had expired on September 30, 1930, defendant knew that applicant's intention in making the present application was to secure continuous insurance on his life; that defendant had no different information in its possession on November 15, when it attempted to reject the insurance, than it possessed on October 14 and October 7, after having reviewed applicant's application, investigated his medical and other record and made microscopical examinations of his urine; that it was defendant's duty after being apprised of all the facts in connection with the risk in question to have acted promptly on the application and that

that on October 14, 1965, a third updating of notice was requested
of Metropolitan's office in the New York office; that nothing
further was done by the Jackson in the way of communicating with
the Chicago office until November 8, 1965; that on that day they
requested, by mail, information of the Chicago office as to the
then status of the case; that upon receiving information from Chicago
November 15, 1965, that the name New York had initial notice,
Metropolitan in turn requested permission to reject the insurance in
question; that on November 29, the death of the applicant was known
to Metropolitan and it was indicated to reject the insurance because of
the fact that the application was misrepresentative; that had it been
the date of death otherwise would not have attempted to make the rejection;
that the New York office of Metropolitan were of the opinion, prior to
learning of the death of applicant, that he was an insurable risk on
the date of the application and that the application was effective
nevertheless under the rules of the underwriting that from the fact that
the check was presented October 2 and received the expiration on the
then five 5 year term policy existing subject in the beneficiary of
the applicant, and from the further fact that the insurance that
applicant had been carrying with defendants under the five-year term
policy ended October 1, 1965, and applied on September 30, 1965,
defendants knew that applicant's intention in making the present
application was to secure continuous insurance on his life; that
defendant had no different information in the possession on November
30, when it attempted to reject the insurance, than it possessed on
October 14 and October 7, when having received applicant's
application, investigated his medical and other record and made
microscopical examination of his urine; that it was defendant's
duty after being apprised of all the facts in connection with the
risk in question to have acted promptly on the application and that

it failed so to do; that defendant did not attempt to reject the insurance within a reasonable time and when it did so attempt, after learning of the applicant's death and upon no other information than it had on October 7 and October 14, it acted arbitrarily and in violation of the rights of applicant; that its failure under the circumstances to reject the insurance until after applicant's death raises the presumption and inference that defendant, through its duly authorized officers, was, prior to applicant's death, and prior to learning of his death, of the opinion, as contemplated by the receipt under consideration, that applicant was an insurable and acceptable risk as contemplated by the application, and raises the presumption and inference that defendant had during applicant's life accepted him as an insurable risk, and that by virtue of these facts defendant during such time was of the opinion that applicant was in fact an insurable and acceptable risk and that defendant did in fact accept applicant and did in fact approve the application. Defendant filed the plea of the general issue as to both counts.

Plaintiff contends that "the court erred in granting the defendant's motion, made at the close of the case, to exclude all of the evidence and to give a written instruction directing the jury to return a verdict in its favor; erred in giving the instruction itself; and erred in this connection in overruling plaintiff's motion for a new trial and entering judgment for the defendant, for the reason that the case involved a question of fact for a jury." The following is plaintiff's statement of her position: "The plaintiff's theory so far as the first count of the declaration is concerned, is that by reason of the fact that the defendant knew, or should have known, as early as October 7, 1930, that the applicant was not an insurable risk, it at that time acquired the right under the contract to reject the insurance and that by cashing the premium check there-

after, taking the proceeds into its accounts and retaining them until after the death of the applicant on November 11th, and then rejecting the insurance only after learning of his death and on such information only as it already possessed on October 7th, it was a question of fact for a jury to say whether or not the defendant had in fact waived the right to reject; and her theory under the second count is that by reason of these facts and, assuming that there was evidence that the applicant was in good health on October 2nd, it was for a jury to say whether or not the defendant was of the opinion, as contemplated by the terms of the preliminary contract, that he was in good health on the date indicated."

Defendant contends that "when all of the evidence in the case is considered, with all of its intendments taken in plaintiff's favor, it is not sufficient in law to support either count of plaintiff's declaration, and that therefore the trial court properly took the case from the jury and directed a verdict for defendant."

Both parties concede that "there is practically no dispute as to the facts in the case," although plaintiff argues that "different inferences from the evidence, however, might be made by different persons."

Martin . Howell was insured by defendant under a five-year term policy of life insurance, for $25,000, which expired on September 30, 1930. On October 2, 1930, at the solicitation of Charles Wadsworth, an agent of defendant, Howell applied for a new policy upon his life in the amount of $20,000, and at the same time gave to Wadsworth his check for the first quarterly premium on the "proposed insurance." On October 1 he was examined by one of defendant's medical examiners and a specimen of urine was furnished defendant by Howell. The check, at Howell's request, was not deposited by Wadsworth until October 8, as Howell stated that it was not convenient

after, using the pretense that the accounts had included that until after the death of the supposed co-trustee John and thus rejecting the insurance only after learning of his death and on some information only as it already happened on October 7th, it was a question of fact for a jury in any whether or not the defendant had in fact waived the right to payment and had thereby waived it; but by reason of these facts and, assuming that there was evidence upon the equitable was a good basis on which the jury in fact or not the defendant was of the opinion, as contemplated by the terms of the policy contract, that he was in good health on the date indicated."

Defendant contends that "when all of the evidence in the case is considered, with all of the inferences taken in plaintiff's favor, it is not sufficient to sustain a verdict upon proof of plaintiff's derivative, and that therefore the trial court improperly took the case from the jury and directed a verdict for the defendant."

This position rounds that "there is particularly no dispute as to the facts in this case," although plaintiff argues that "different inferences from the evidence, however, might be made by different persons."

Earlier, Jewell was insured by Colonial under a life-insurance policy of this insurance, the $10,000, which expired on December 30, 1930. On October 3, 1927, at the hospitalization of Theodore Fahnestock, an agent of defendant, Jewell applied for a new policy upon his life in the amount of $20,000, and at the same time gave to Fahnestock his check for the first quarterly premium on the "proposed insurance." On October 3 he was examined by one of defendant's medical examiners and a specimen of urine was furnished defendant by Jewell. The check, at Jewell's request, was not deposited by Fahnestock until October 6, as Jewell stated that it was not convenient

for him to meet it until that date. Upon receipt of the check Wadsworth gave to Howell the following receipt:

"Received of Martin A. Howell, $99.90 Dollars, the first quarter annual premium on proposed insurance for $20,000 on the life of Martin A. Howell for which Part I of an application * * * is this day made to the Equitable Life Assurance Society of the United States. Insurance, subject to the terms and conditions of the policy contract, shall take effect as of the date of this receipt, provided satisfactory Part II of the application is furnished to the Society and provided the applicant is on this date in the opinion of the Society's authorized officers in New York, an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount and at the rate of premium applied for; otherwise the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt."

The application provided that the insurance was not to take effect until the first premium should be paid during the applicant's good health, and that no one except defendant's president or a vice-president, or other designated officers of defendant, should have power to make or modify any contract on its behalf or to waive any of its rights or requirements. The application states that the applicant knew and agreed to the terms and provisions contained in the premium receipt. The check in question, when offered in evidence by plaintiff, contained on its face the following: "New 5 year term policy starting today." The trial court allowed the contents of the check, with the exception of the above quoted words, to be read to the jury, but the check itself was excluded on the ground that it had not been shown that the quoted words were on the check at the time it was delivered to defendant. No point, however, is made by plaintiff that the court erred in so ruling. A medical analysis of the urine submitted by Howell disclosed "impairments," and pursuant to defendant's rules the specimen was forwarded to its New York office, along with the examiner's report, where it was received on October 5 and at once referred to the medical department, where it was rated as a "committee case." A microscopical examination of the urine,

made on October 7, indicated the presence of albumin and casts. Thereupon defendant, on the same day, telegraphed its representative in Chicago for a second specimen and followed the wire with a letter to the same effect. A second specimen of urine was furnished by Howell on October 10, and it was received in New York on October 14. On that date a microscopic analysis of this specimen showed "negative findings." On October 15 a telegram was sent by defendant from New York to its Chicago office asking for a third specimen, and this was followed immediately by a letter confirming the telegraphic request. Upon receipt of the telegram Wadsworth telephoned Howell several times requesting him to furnish a third specimen, but the latter did not come to Wadsworth's office until October 20 or 22, at which time he stated to Wadsworth that he had a carbuncle on his neck and that he did not want to furnish the specimen at that time, that he was going on a hunting trip which would last several days and that he would come in upon his return and furnish the specimen. On October 29 defendant's Chicago office wrote to its New York office that it was trying to obtain the required specimen. On November 5 the New York office wrote the Chicago office inquiring as to the then status of the case. About the same time Wadsworth again telephoned Howell requesting an additional specimen of urine, and the latter stated, in substance, that he would come in and furnish it, but he did not thereafter come in and he never furnished a third specimen. Wadsworth, who was called as a witness by plaintiff, testified that "at least four times after October 14th" he asked Howell to supply an additional specimen of the latter's urine. On November 11 Howell died, and his attending physician certified to the Chicago Board of Health that the cause of his death was "arteriosclerosis, myocarditis; duration of same - five years. Contributory (Secondary) cause - coronary thrombosis. Duration - 2 days." When the Chicago office learned of his death it

made on October 7, indicate the presence of albumin and waste. Thereupon defendant, on the same day, delegated his representative in Chicago for a second examination and followed his visit with a letter to the same effect. A second examination of urine was furnished by Howell on October 12, and it was received in New York on October 14. On that date a microscopic analysis of this specimen showed "markedly limiting." On October 13 a telegram was sent by defendant from New York to its Chicago office making the a third examination, and this was followed immediately by a letter ventilating the telegraphic request. Upon receipt of the telegram Wadsworth telephoned Howell several times requesting him to furnish a third specimen, but the latter did not come to Wadsworth's office until October 20 or 21, at which time he stated to Wadsworth that he had a carbuncle on his neck and that he did not want to furnish the specimen at that time, that he was going on a hunting trip which would last several days and that he would come in upon his return and furnish the specimen. On October 22 defendant's Chicago office wrote to its New York office that it was trying to obtain the required specimen. On November 2 the New York office wrote the Chicago office inquiring as to the then status of the case. About the same time Wadsworth again telephoned Howell requesting an additional specimen of urine, and the latter stated, in substance, that he would come in and furnish it, but he did not thereafter come in and he never furnished a third specimen. Wadsworth, who was called as a witness by plaintiff, testified that "at least two times after October 14th" he asked Howell to furnish an additional specimen of the latter's urine. On November 11 Howell died, and his attending physician certified to the Chicago Board of Health that the cause of his death was "arteriosclerosis, myocarditis; duration of some - five years; contributory (secondary) cause - cerebral thrombosis. Duration - 2 days." When the Chicago office learned of his death it

notified the New York office, which, on November 15, declined the application upon the ground that the case was "incomplete medically," and authorized a refund of the premium. Plaintiff made no attempt to prove that Newell was in good health when the first premium upon the proposed insurance upon his life was paid. In fact, she introduced expert evidence to the effect that on October 2 Newell had a chronic inflammation of the kidneys and also myocarditis or degeneration of the heart tissues. In her brief, she states: "Mr. Newell died quite suddenly of a combination of arteriosclerosis, myocarditis and coronary thrombosis. It was shown through Dr. Rankin, who is well qualified to testify on subjects of this kind, that the finding of casts in a person's urine absolutely establishes the existence of a chronic disease of the kidneys, and if later examinations reveal no impairments it would make no difference because where casts are once found in the urine the presence of the disease is definitely fixed. Diseases of the kidneys are very serious and are discoverable from a microscopical examination of the urine if they have existed for any length of time. Under the facts appearing in the instant case, the entire condition of the applicant could be discovered by a microscopical examination. It further appeared that Mr. Newell's condition on October 2, 1930, would be disclosed by a microscopical examination on October 7th of a specimen of his urine taken on October 1st. That examination under the circumstances indicated in the record shows that Mr. Newell was suffering from myocarditis and inflammation of the kidneys on the date of the application." Plaintiff further contends, in her brief, that "the defendant knew, or should have known, as early as October 7, 1930, that the applicant was not an insurable risk."

Plaintiff concedes that in order to recover upon the alleged contract of insurance she is required to allege and prove

agrees the New York office, which, on November 14, rescinded the application upon the ground that the case was "incomplete medically", and authorized a refund of the premium. Liberality made an attempt to prove that Howell was in good health when the first premium upon the proposed insurance upon his life was paid. In fact, the insured expert evidence in the effort that a medical examination of the kidneys and also hypertrophy or congestion of the heart existed. In his brief, the attorney Howell that this constitutes a violation of warranties, representations and necessary disclosures. It was shown through Dr. Hawley, who is well qualified to testify on subjects of this kind, that the finding of cells in a person's urine constantly evidences the existence of a chronic disease of the kidneys, and if later examinations proved no improvements it would show on differences because under cases are more fixed in the urine the presence of the disease is definitely fixed. Diseases of the kidneys are very serious and are discoverable from a microscopical examination of the urine if they have existed for any length of time. Under the facts appearing in the instant case, the entire condition of the applicant would be disclosed by a microscopical examination. It further appears that Dr. Hawley's medicine of October 2, 1920, which he disclosed by a microscopical examination on October 7th at a premium of his notice taken on October 1st. That examination under the circumstances indicated in the record shows that Mr. Howell was suffering from pyonephrite and inflammation of the kidneys on the date of the application." Liberality further contends, in her brief, that "the information here, it should have known, on July 2a October 7, 1920, that the applicant was not an insurable risk."

Liberality contends that in order to recover upon the alleged contract of insurance the is required to allege and prove

performance of conditions precedent or allege and prove waiver of such conditions, and her major contention is that "it was clearly a jury question as to whether or not there was a waiver under the first count of the declaration;" that "the waiver involved here is an implied, as distinguished from an express, waiver." Plaintiff concedes that under the facts and circumstances bearing upon the alleged waiver, a jury could, without acting unreasonably in the eye of the law, find that there was not a waiver by defendant; but she strenuously argues that a jury might also, without acting unreasonably in the eye of the law, find that defendant had indicated an intention on its part to waive the right of rejection and that therefore the case should have been submitted to the jury.

Plaintiff argues that defendant knew, or should have known, on October 7 that Howell was not in good health and that therefore the trial court should have allowed the jury to pass upon the question as to "whether the cashing of the premium check thereafter, retaining the proceeds until after the death of the applicant, coupled with the element of delay under the circumstances involved, and the further fact that the defendant attempted to reject the insurance only after it learned of the applicant's death and then on such information only as it already possessed on October 7th, did not indicate an intention on its part to relinquish the right of rejection." Plaintiff concedes that mere delay does not supply the element of consent in contract cases, but contends that when the other circumstances, just referred to, are added to the element of delay, a jury might, without acting unreasonably, have found for plaintiff, upon the theory of waiver. It is established law that mere delay never has the effect of amounting to an acceptance of an offer, and it has been further held that delay on the part of an insurer in acting upon an application, far from amounting to

acceptance, is rather indicative of a refusal of the application. (See More v. New York Bowery Fire Ins. Co., 29 N. Y. 757; New York Union Mut. Ins. Co. v. Johnson, 23 Pa. St. 72; Alabama Gold Life Ins. Co. v. Mayes, 61 Ala. 163; Brink et al. v. Merchants' & Farmers' United Mut. Ins. Ass'n of S. Dak., 17 S. Dak. 235.) As we read the record it is perfectly obvious that the delay on the part of defendant was occasioned solely by the failure of Howell to respond to repeated requests for a third specimen of urine, and it is equally plain, under the proof, that defendant had the right to insist upon a third specimen being furnished by him. Plaintiff attaches considerable importance to the cashing of the check on October 9. The premium receipt reads: "Received of Martin A. Howell $99.90 Dollars, the first quarter annual premium on proposed insurance * * *." Cases cited by plaintiff to the effect that acceptance or retention of an overdue premium by an insurance company with knowledge of grounds for forfeiting the policy constitutes a waiver of the forfeiture, have no application to the facts of the instant case. In the cases cited the insurance was in force but was subject to forfeiture on conditions subsequent. As stated by defendant, forfeitures, under such circumstances, are easily waived and it is settled law that they are waived by the acceptance of continued performance under the contract. But in the instant case there is no question of forfeiture or of restoring the original force of a contract, as the contract with Howell was that he was insured in the event that the conditions precedent were complied with. The premium was accepted by the Society subject to certain express conditions and if they were not fulfilled "the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt." It will be noted that even in the class of cases cited by plaintiff no waiver results if the acceptance of the premium is upon express conditions which are not complied with. In connection with the argument of plaintiff

acceptance, in rather imperative of a refusal of the application. (See also v. Ins. Insurance Co., 16 N. v. 1873 Sun Life Union Mut. Ins. Co. v. Robinson, 24 Mo. 78. 1873 Absolute Life Ins. Co. v. Moore, 81 Ala. 1887 Brick et al. v. Insurance Company, United Life Ins. Co. v. Ins. 17 Ala. 1850.) As we read the record it is perfectly evident that the delay on the part of defendant was occasioned solely by the failure of Howell to respond to repeated requests for a third questionnaire, and it is equally clear, under the proof, that defendant had the right to insist upon a third questionnaire being furnished by him. Plaintiff attaches unmistakable importance to the sending of the check on October 9. The premium receipt reads: "Received of Martin A. Howell $19.80 Dollars, the first quarter annual premium on insurance policy # 4 4." Some stress by plaintiff to the effect that acceptance or rejection of an insurance premium by an insurance company with knowledge of grounds for forfeiture the policy constitutes a waiver of the forfeiture, have no application to the facts of the instant case. In the case cited the insurance was in force but was subject to forfeiture on qualifying conditions. In stated by defendant, forfeitures, under such circumstances, are usually waived and it is settled law that they are waived by the acceptance of continued performance under the contract. But in the instant case there is no question of forfeiture or of restoring the original terms of a contract, as the contract with Howell was that he was insured in the event that the conditions precedent were complied with. The premium was accepted by the society subject to certain express conditions and if they were not fulfilled "the payment evidenced by this receipt shall be returned on demand and the surrender of this receipt." It will be noted that even in the case of cases cited by plaintiff to waive results if the acceptance of the premium is upon express conditions which are not complied with. In connection with the arguments of plaintiff

as to the circumstance that defendant rejected the application after knowledge of Howell's death, it must be noted that defendant had made persistent efforts to secure a third specimen of urine and that its failure to obtain the same was due entirely to the conduct of Howell. It has been held that while it might be improper for an insurer to reject after death an applicant whom it would otherwise have accepted, it is not improper to reject after death an applicant who would have been rejected anyway had he lived and had the true state of his health been known. (See Northwestern Mut. Life Ins. Co. v. Neafus, 145 Ky. 563; Indiana Nat. Life Ins. Co. v. Maines, 191 Ky. 309.) After giving very careful consideration to the question of waiver, we have reached the conclusion that the trial court did not err in holding, as a matter of law, that the evidence did not show facts from which a jury could, without acting unreasonably in the eye of the law, find that there was a waiver by defendant. The proof is undisputed that prior to the death of Howell the medical officers of defendant were insisting for a further specimen of urine, which shows conclusively that they had not reached an opinion as to the application. Under all the circumstances of the case the argument that a jury might, without acting unreasonably, have found that defendant had waived its right to reject the application, is without merit.

It is apparent from the argument of plaintiff that she does not place much reliance upon her contention that the evidence warranted a submission of the case to the jury under the second count of the declaration.

After a careful consideration of the instant appeal, we have reached the conclusion that the judgment of the Circuit court of Cook county should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

as is the circumstance that petitioner violated the solicitation after Incumbent of Jewell's arrival, it must be noted that extremely low work productivity stemmed as a result of certain conditions that his failure to obtain the same was the majority in the workers of Jewell. It has been said that while it might be improper for an inspector to enter direct contact in negotiations when it would otherwise have occurred, it is not improper to refuse after which an application was made. Such an inspector may be liked and the same action of his would have been acceptable. Thus Bricklayers Int. Lib. Inc. v. Stuart, 340 U.S. 428; Inter Union Contract Construction Co. Inc. v. Jones, 340 U.S. 504.

In the question of waiver, we have reached the conclusion that the total wages the worker is entitled, as a matter of law, from the employer did not show facts from which a jury could, without making conjecture in the eye of the law, find that there was a waiver by petitioner. The point in controversy that petitioner is not liable for the wrongful efforts of foremen were instructing for a further violence of orders, which were contradictorily that they had not received an opinion as to the application. Under all the circumstances of the case the arguments that a jury might, without substantially have found that defendants had waived the right to enjoin the application, is without merit.

It is apparent from the argument of plaintiff that she does not place much reliance upon her contention that the evidence warranted a conclusion of the case to the jury under the second count of the declaration.

After a careful consideration of the instant appeal, we have reached the conclusion that the judgment of the Circuit Court of Cook County should be affirmed and it is so ordered.

AFFIRMED.

Mullivan, P. J., and Gridley, J., concur.

237

36498

JEANETTE HUNT,
Defendant in Error,

v.

FRANK V. SCHORSCH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

272 I.A. 606

MR. JUSTICE MCMILLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in a fourth class contract action in the Municipal court of Chicago. In a trial before the court there was a finding against defendant and plaintiff's damages were assessed at the sum of $1,000. Judgment was entered upon the finding and defendant has sued out this writ of error.

Plaintiff sued for damages arising out of an alleged breach of a restrictive covenant contained in a written lease entered into between the parties, dated August 4, 1931, for the premises known as 6055 Irving Park boulevard, to be occupied for lingerie, hosiery and specialty shop, the term commencing August 1, 1931, and ending July 31, 1932, plaintiff (lessee) to pay as rent $70 per month. By the terms of the lease defendant (lessor) agreed "not to rent any other store in this block for the same line of business providing lessor is the owner." Plaintiff alleges, in her statement of claim, that on January 16, 1932, defendant breached the said covenant by leasing and renting the premises known as 6057 Irving Park boulevard as a lingerie, hosiery and specialty shop to one Mrs. Johnson, who went into possession during the month of January, 1932, as a tenant of defendant; that the said business was in the same block with plaintiff and was competitive

[illegible]

[illegible]

[illegible]

with plaintiff's business; that this breach continued daily from January 16, 1932, to May 14, 1932, and that as a result of the breach plaintiff's business has been damaged in the sum of $1,000.

The contention of defendant that plaintiff failed to prove that the defendant breached the covenant in question is without merit.

The sole meritorious contention of defendant is that the damages allowed are excessive. We recognize the fact that it is difficult to prove with certainty the amount of loss or damage sustained in a case like the instant one. That plaintiff was damaged by the breach of the covenant in question cannot be seriously disputed. As said by our supreme court in Barnett v. Caldwell Furniture Co., 277 Ill. 286, 289: "It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages." It has also been held that for a violation of a covenant not to engage in a business like the one sold, the injured party may recover for loss of profits and diminution in the value of the business. (Mirkovich v. Maravich, 206 Ill. App. 463.) After a careful consideration of the entire evidence bearing upon the question of damages and after giving due consideration to the further fact that practically all lines of business suffered a diminution of profits during the period in question, we have

with plaintiff's business that this breach continued until from January 16, 1928, to May 14, 1928, and that as a result of the breach plaintiff's business has been damaged in the sum of $5,000.

The contention of defendant that plaintiff failed to prove that the defendant breached the covenant in question is without merit.

The sole material contention of defendant is that the damages allowed are excessive. We recognize the fact that it is difficult to prove with mathematic the amount of loss or damage sustained in a case like the instant one. That plaintiff was damaged by the breach of the covenant in question cannot be seriously disputed. As said by our supreme court in Kansas Gas Company Interests Co., 107 Kan. 688, 693: "If it proves true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be ascertained by competent proof. That proof of the exact amount of loss is impossible will not justify returning nonsensicals. If the jury, centrists of the kind here involved could be relieved with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability lead to establish a basis for the assessment of damages." It has also been held that for a violation of a covenant not to engage in a business like the one sold, the injured party may recover for loss of profits and diminution in the value of the business. (Hillerich v. Bradley, 94 Ill. App. 623.) After a careful consideration of the entire evidence bearing upon the question of damages and after giving due consideration to the further fact that practically all lines of business suffered a diminution of profits during the period in question, we have

reached the conclusion that $500 would be a reasonable amount to allow plaintiff for the damages she sustained. Therefore, if within ten days from the filing of this opinion plaintiff will enter in this court a remittitur of $500, the judgment against defendant will be affirmed for $500, otherwise it will be reversed and the cause remanded to the Municipal court of Chicago for another trial.

JUDGMENT AFFIRMED FOR $500 UPON REMITTITUR OF $500; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR ANOTHER TRIAL.

Sullivan, P. J., and Gridley, J., concur.

36541

DANIEL LAVORINI, Administrator,
Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

272 I.A. 606

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant on a life insurance policy issued by it and recovered a judgment on a verdict for $884.50. Defendant has appealed.

The declaration alleges that defendant issued its policy on the life of Julia Lavorini, wife of Daniel Lavorini, and that while it was in full force and effect she died of an attack of acute nephritis; that proof of death was given defendant but that it thereafter advised plaintiff by letter, through its attorneys, that payment of the claim thereunder was refused because "the investigation, which it made subsequent to death disclosed treatment prior to the policy date and within two years thereof for a serious kidney condition," and that defendant offered to return premiums paid amounting to $22.60 in full settlement of said claim. The declaration further alleges that the insured at the time of the issuance of the policy and the taking of the application therefor was alive and in sound health and had not theretofore been rejected and "* * * neither before said date had she had any pulmonary disease or chronic bronchitis or cancer, or disease of the heart, liver or kidneys; * * *" Defendant filed the plea of the general issue and also a notice of special matters of defense, which

special matters were set up in an affidavit of one of the attorneys for the defendant. The salient matters in the affidavit are as follows:

"That the policy sued upon herein contains a condition that the said policy shall be void and the liability of the defendant company, in case of any claim thereon, shall be limited to the return of premiums paid if (a) the insured * * * is not in sound health on the date thereof; and affiant says that the said insured, Julia Lavorini, on * * * the date of said policy, was not in sound health; or if (b) * * * within two years before the date thereof, she had been attended by a physician for any serious disease or complaint, or before said date, has had any * * * disease of the heart, liver or kidneys * * *; and affiant says that within two years before the date of said policy * * * the said Julia Lavorini had been attended by a physician for a serious disease and/or had had disease of the heart, liver or kidneys; and that by reason thereof the defendant company did declare the said policy void and tendered, before the filing of this suit, to the plaintiff herein and/or his attorney, the return of the premiums paid on said policy in the sum of $22.60, which tender and offer of payment in said sum, the said plaintiff and/or his attorney, then and there rejected and refused.

"4. That if the defendant company had known on the date of said policy that the insured was not in sound health, and had, within two years before said date, been attended by a physician for a serious disease or complaint, or before said date had had any disease of the heart, liver or kidneys, it would not have issued its said policy on the life of said Julia Lavorini, and that by reason of concealment of said facts with reference to the health and attendance by a physician for a serious disease on the part of said Julia Lavorini, the said policy was and is void ab initio and under the said policy conditions the liability of the defendant company is limited to the return of the premiums paid on said policy."

The policy contains the following provision:

"The Company assumes no obligation prior to the date hereof. * * * If, (1) the Insured is not * * * in sound health on the date hereof; or if (2) before the date hereof, the Insured * * * has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, * * * then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud, in which case all premiums will be forfeited to the Company."

Defendant's theory is: "That insured was not in sound health on the date of the policy and had been attended by a physician within two years prior to that date for a kidney disease; that she had had chronic kidney disease during that period; that the defendant

special matters were put up in an affidavit of one of the attorneys for the defendant. The actual matters in the affidavit are as follows:

"That the policy sued upon herein contains a condition that the said policy shall be void and the liability of the defendant company, in case of any claim thereon, shall be limited to the return of premiums paid if (a) the insured * * * is not in good health at the date thereof and affirms says that the said insured, John Lawrence, on * * * the date of said policy, was not in good health; or if (b) * * * within two years before the date thereof, he had been attended by a physician for any serious disease or complaint, or before said date, he had any disease of the heart, liver or kidneys and affirms says that within two years before the date of said policy * * * the said John Lawrence had been attended by a physician for a serious disease and/or had had disease of the heart, liver or kidneys and that by reason thereof the defendant company did declare the said policy void and terminated, before the filing of this suit, as the plaintiff herein and/or his attorney, the return of the premium paid on said policy in the sum of $24.00, which tender and offer of payment in said sum, the said plaintiff and/or his attorney, then and there rejected and refused.

"4. That if the defendant company had known on the date of said policy that the insured was not in sound health, and had, within two years before said date, been attended by a physician for a serious disease or complaint, or before said date had had any disease of the heart, liver or kidneys, it would not have issued the said policy on the life of said John Lawrence, and had by reason of concealment of said facts with reference to the health and attendance by a physician for a serious disease on the part of said John Lawrence, the said policy was and is void ab initio and under the said policy constituting the liability of the defendant company is limited to the return of the premiums paid on said policy."

The policy contains the following provisions:

"The company assumes no obligation prior to the date hereof, * * * if, (1) the insured is not * * * in sound health on the date hereof; or if (2) before the date hereof, the insured * * * has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or disease of the heart, liver or kidneys, * * * then, in any such case, the company may declare this policy void and the liability of the company in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the company."

Defendant's theory is: "That insured was not in sound health on the date of the policy and had been attended by a physician within two years prior to that date for a kidney disease; that he had chronic kidney disease during that period; that the defendant

had the right to declare the policy void under the policy provisions, which it did and tendered back the premiums paid which, by the terms of the policy, was the extent of its liability in case any claim was made thereon. * * * The question at issue in this case is whether the insured was on the date when the policy was issued (November 1, 1929) in sound health and whether she had been attended by a physician within two years prior to that date for a disease of the kidneys."

In support of its contention that the counsel for plaintiff made an improper and prejudicial argument to the jury, defendant admits that "this was a closely contested case." The burden was upon plaintiff to prove that the insured was in good health on the date of the policy and defendant contends that he failed to sustain said burden. After a very careful consideration of the instant contention we have reached the conclusion that it is not a meritorious one. Defendant introduced the testimony of a physician, who claimed to have attended the deceased, to the effect that the deceased, in 1927, 1928 and 1929 was suffering from a chronic nephritic condition, and defendant argues that the testimony of the nonmedical witnesses produced by plaintiff, to the effect that the insured was in sound health during the period in question, was entitled to but little weight against the testimony of the physician. Under all the facts and circumstances of this case, we are not inclined to agree with this argument. The physician in question was not called as an expert, but as an attending physician, to testify to alleged conditions he found during his treatment of the deceased, nevertheless he admitted that he expected to be paid "for testifying here." He was asked the following question: "How much do you expect to bill them for your services in toto in this case?" to which he answered: "Well, whatever the usual fee is." While he

had the right to declare the policy void since the policy provision, which it did not conform, that the premiums paid which, by the terms of the policy, was the extent of its liability in case any claim was made thereon. * * * The question at issue in this case is whether the insured was on the date when the policy was issued (October 1, 1926) in sound health and whether she had been attacked by a physician within two years prior to that date for a disease or condition.

In support of the contention that the demurrer for plaintiff made no logical and jurisdictional argument to the jury, defendant admits that "this was a directly contested case." The burden was upon plaintiff to prove that the insured was in good health on the date of the policy and defendant contends that he failed to sustain such burden. After a very careful consideration of the issues involved, we have reached the conclusion that it is not a meritorious case. Defendant introduced the testimony of a physician, who claimed he had attended the deceased, in the effort that the deceased, in 1927, 1928 and 1929 was suffering from a chronic emphysic condition, and defendant argues that the testimony of the nonmedical witnesses produced by plaintiff, to the effect that the insured was in sound health during the period in question, was nullified in but little weight against the testimony of the physician. Under all the facts and circumstances of this case, we are not inclined to agree with this argument. The physician in question was not called as an expert, but as an attending physician, to testify to alleged conditions he found during his treatment of the deceased, nevertheless he admitted that he expected to be paid "for testifying here."

He was asked the following questions: "How much do you expect to bill them for your services in this in this case?" to which he answered: "Well, whatever the usual fee is." While he

sought to create the impression that he was testifying to facts concerning the condition of a former patient because he was obliged to, it appears that over two years before he testified he had voluntarily given to defendant company a certificate to the effect that about November, 1928, he treated the deceased "for about a month at that time for an acute exacerbation of nephritis superimposed on an old chronic Nephritic condition." The jury have passed upon his credibility and the weight that should be attached to his testimony, and we do not feel justified in disturbing their finding in that regard. As bearing upon the question of the health of the deceased at the time in question, we may add that the agent of defendant who took the application of the deceased, certified to the company that he believed the deceased was in good health at the time she made the application.

We find no substantial merit in the contention of defendant that the court erred in giving two instructions for plaintiff and in refusing to give five instructions tendered by defendant; and the same may be said as to the further contention of defendant that it was prejudiced by unfair and improper argument of plaintiff's counsel to the jury.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

enough to create the impression that he was benefiting as much concerning the condition of a former partner because he was obliged to, it appears that over two years before he testified he had voluntarily given to defendant Hagney a certificate by the effect that about December, 1923, he trusted the defendant "for about a month at that time for an equal consideration of respective agency."

The jury have passed on the credibility and the weight that should be attached to his testimony, and we do not feel justified in disturbing their finding in that regard.

As bearing upon the question of the amount of the time in question, we may add that the agent of defendants who took the application at the dispensary, testified in the company that he believed the insured was in good health at the time he made the application.

We find no substantial merit in the contention of defendant that the court erred in giving the instructions for plaintiff and in refusing to give five instructions tendered by defendant; and the same may be said as to the further contention of defendant that it was prejudiced by unfair and improper argument of plaintiff's counsel to the jury.

The judgment of the superior court of Cook county is affirmed.

AFFIRMED.

Smith, P. J., and Crissey, J., concur.

25 A

36551

FLOYD P. GAINES,
Appellee,

v.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 606[3]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment for $404.80 entered against it in an action ex delicto. The case was tried by the court without a jury.

The statement of claim alleges that plaintiff for a number of years was employed by the McClintic-Marshall Corporation as a steel fitter, receiving 67 cents per hour and earning approximately $27 a week; that he was temporarily "laid off," due to a shortage of work in his department; that on or about December 23, 1931, the said Corporation sent a telegram, charges prepaid, through the defendant, addressed to plaintiff; that defendant so carelessly and negligently performed its duties and services that by and through the failure and neglect of its employees and agents, it failed and neglected to deliver the said telegram to plaintiff; that said telegram recalled plaintiff to work, and that by reason of the neglect and carelessness of defendant, its agents and servants, plaintiff was deprived of employment for a period of six months, "which work he was assured of" by the said Corporation, and that as a result of the said carelessness, etc., on the part of defendant plaintiff sustained damages, by reason of loss of employment for a period of six months to the amount of $900.

[illegible]

[illegible]

[illegible]

The material part of the affidavit of merits is as follows: "Defendants admit that on or about December 23, 1931, it did receive a telegram from McClintic Marshall Corporation, charges prepaid, which telegram was to be delivered to Floyd P. Gaines at 662 Roscoe Street, Chicago, Illinois; * * * that it delivered said telegram to 662 Roscoe Street, the address given in said telegram; that it was informed and advised that said Floyd P. Gaines no longer resided at that address and the address was given to this defendant as 833 or 883 North LaSalle Street, Chicago; that this defendant attempted to deliver said telegram at 833 North LaSalle Street and was informed that said plaintiff, though known at that address and having formerly resided at that address, was not then residing there but had moved from there and his present whereabouts were unknown, whereupon said defendant returned said telegram to the sender thereof, stating that the telegram was undelivered and defendant had moved from 662 Roscoe Street and the address to which he had moved was also unknown and, therefore, the telegram was returned 'unable to deliver.'" (Italics ours.) The affidavit denies that defendant was careless and negligent in its attempt to deliver the message to plaintiff, and denies that as a result of any such alleged carelessness, neglect or failure on its part plaintiff sustained damages in the sum of $900 or any other sum.

The evidence shows that plaintiff, prior to December 12, 1931, lived at 662 Roscoe street, Chicago, with Mr. and Mrs. LaBounty; that on that date he moved to 883 North LaSalle street and resided there until January 2, 1932; that he had been employed as a structural steel worker for sixteen years and had worked for the McClintic-Marshall Corporation for about five years prior to the time in question; that on December 23, 1931, he was not working,

The material part of the affidavit of merits is as follows: "Defendants admit that on or about December 22, 1951, it did receive a telegram from Pacific Northwest Conservation Engineer Project, which telegram was to be delivered to Plaintiff at Salem at 625 Center Street. Defendant claiming - - - that it delivered said telegram to 125 Center Street, the address given in said telegram; that it was informed and believed that said Plaintiff - claims no longer resided at that address and the address was given to this defendant as 625 Center Street; defendant admits that this defendant attempted to deliver said telegram at 625 Center Street; that it was informed that said plaintiff, through known at that address and having formerly resided at that address, was not then residing there but had moved from there and his present whereabouts were unknown, whereupon said defendant returned said telegram to the sender thereof, stating that the telegram was undelivered and defendant had moved from 625 Center Street and the address to which he had moved was also unknown and, therefore, the telegram was returned 'unable to deliver.'" (Italics ours.) The affidavit denies that defendant was derelict and negligent in its attempt to deliver the message to plaintiff, and denies that as a result of any such alleged omissions, neglect or failure on its part plaintiff sustained damages in the sum of $500 or any other sum.

The evidence shows that plaintiff, prior to receipt of the telegram, lived at 625 Center Street, Salem, with Mr. and Mrs. Lawrence. When he left that to move to 625 North Lancaster street and resided there until January 2, 1952; that he had been employed as a structural steel worker for Atlantic Steel and had worked for the Lockheed-Burbank Corporation for about five years prior to the time in question. Since on December 21, 1951, he was not working, the telegram was not delivered to him at 125 Center Street, but was returned to the sender thereof.

having been laid off temporarily by the said Corporation; that when he left 662 Roscoe street he told Mrs. LaBounty that he was moving to 833 North LaSalle street; that he was at this last mentioned place on December 23 and 24; that letters addressed to him at 662 Roscoe street during the time in question were promptly delivered to him at 833 North LaSalle street; that he had not lived at 833 North LaSalle street since 1929. The telegram in question was as follows:

"Dec. 23, 1931

Floyd P. Gains
662 West Roscoe St

Report for work at once

McClintick Marshall Corp."

Although the affidavit of merits states that when defendant attempted to deliver the telegram at 662 Roscoe street it was informed that plaintiff no longer resided there and that his then address was 833 or 883 North LaSalle street, Chicago, its theory of fact upon the trial was that when the messenger boy attempted to deliver the telegram at 662 Roscoe street a lady there told him that plaintiff did not then live there and that he was living at 883 North LaSalle street; that the boy wrote that address on the envelope and left it on the desk in the office of defendant; that a second messenger boy, who was then given the telegram, went to 833 North LaSalle street, where he was told that plaintiff had moved and had left no forwarding address; that the second messenger boy then brought the telegram back to defendant's office; that no attempt was made to deliver the telegram at 883 North LaSalle street, nor at any other place; that the telegram was returned, on December 24, to the sender, with the statement that plaintiff had moved from 662 Roscoe street and that defendant was "unable to deliver" the telegram. Plaintiff first learned of the sending of the telegram

having been laid off temporarily by the said corporation; that when he left 623 Tenney street he told Mrs. Jackson that he was moving to 833 North Lincoln street; that he was at this last mentioned place on November 15 and that Jackson mentioned to him at 623 Tenney street during the time he resided with him; that Jackson delivered to him at 833 North Lincoln street; that he had not lived at 623 North Lincoln street since 1933. The testimony material was as follows:

"Nov. 29, 1933

Hyde & Hyde
623 West Monroe St

Report for work at once

Westinghouse Electrical Corp."

Although the attorney at Lincoln stated that when defendant attempted to deliver the telegram at 623 Tenney street it was informed that plaintiff no longer resided there and that his last address was 833 North Lincoln street. Nevertheless, the theory of the case upon the trial was that when the messenger boy attempted to deliver the telegram at 623 Tenney street a lady there told him that plaintiff did not then live there and that he was living at 833 North Lincoln street; that the boy stated that whether on the envelope and left it on the desk in the office of defendant; that a second messenger boy, who was then given the telegram, went to 833 North Lincoln street, where he was told that plaintiff had moved and had left no forwarding address; that the second messenger boy then brought the telegram back to defendant's office; that he attempt was made to deliver the telegram at 623 Tenney street at any other place that the telegram was delivered, on December 24, to the sender, with the statement that plaintiff had moved from 623 Tenney street and that defendant was "unable to deliver" the telegram. Plaintiff first learned of the sending of the telegram

on January 5, 1932, when he went to the McClintic-Marshall Corporation's office, where he was then told by the employment manager that when plaintiff did not report for work on December 24 the Corporation was obliged to put another man in his place. It further appeared that the Corporation was unable to put him to work then or at any time thereafter. After an exhaustive examination of the evidence we are satisfied that when the first messenger boy returned the telegram to defendant's office he reported to his superior that the reason that he had not delivered the telegram at 662 West Roscoe street was that plaintiff then lived at 883 North LaSalle street. The same messenger boy also testified that after he was given the new address he wrote it on the envelope inclosing the telegram, but the envelope was not introduced in evidence by defendant.

We are satisfied that there is no merit in defendant's contention that "there is no evidence of negligence on the part of the defendant." The employee at the office who received the telegram from the first messenger boy admits that she wrote on the back of the telegram the following: "TIME RETURNED 12 16 P MSGR. NUMBER 804 REASON 883 N. LaSalle." The second messenger boy testified that he was told to deliver the telegram at 833 North LaSalle street. The evidence also shows that on December 23 "the Christmas rush" was on, and it is clear that the employee at the office who received the telegram from the first messenger boy carelessly gave the address to the second messenger boy as 833 North LaSalle, instead of 883 North LaSalle. As bearing upon the question of negligence, it will be noted that while the affidavit of merits admits that when the first messenger boy went to 662 Roscoe street he was given plaintiff's address "as 833 <u>or 883</u> North LaSalle street," no attempt was made to deliver the telegram at the last

on January 2, 1964, when he went to the Hoffinglo-Arnhold Corporation's office, where he was taken aside by the employment manager that when plaintiff did not report for work on December 24 the Corporation was obliged to put another man in his place. It further appeared that the Corporation was unable to put the man back to work then or at any time thereafter. After an adjournment examination of his evidence he was instructed that when the first messenger had returned the telegram to defendant's office he reported to his superior that the sender had not received the telegram at 422 Park Avenue where that plaintiff then lived at 422 North Lafalle street. The same messenger had also testified that after he was given the new address he wrote it on the envelope containing the telegram, but the envelope was not introduced in evidence by defendant.

We are satisfied that there is no merit in defendant's contention that "there is no evidence of negligence on the part of the defendant." The employee at the office who received the telegram from the first messenger had testified that she wrote on the back of the telegram the Philadelphia "FROM ELEVENTH [illegible] 12 24 2 [illegible], [illegible] BOX [illegible] MAIN ST, LAFALLE." The second messenger had testified that he was told to deliver the telegram at 422 North Lafalle street. The evidence also shows that on December 23 "the Christmas rush" was on, and it is clear that the employee at the office who received the telegram from the first messenger had reasonably gone the address in the second messenger had as 422 North Lafalle, instead of 422 North Lafalle. In deciding upon the question of negligence, it will be noted that while the affidavit of merits admits that when the first messenger had left it 422 Lafalle street he was given plaintiff's address "as 422 no 422 North Lafalle street," no attempt was made to deliver the telegram at the last

number, which was only twenty doors from 833.

Defendant contends that "a telegraph company is not liable where delivery of a telegraphic message is prevented by circumstances over which the company has no control, and for which it is not responsible, nor where the circumstance is one which the company could not have guarded against," and that this rule of law applies to the conduct of defendant in the instant case. Conceding the correctness of the principle of law cited, we are unable to agree with the argument of defendant that it applies to the facts of the instant case; nor are we able to find any merit in the somewhat strained argument of defendant that plaintiff was guilty of contributory negligence.

Defendant contends that the court erred "in permitting the plaintiff to testify to declarations by a purported agent of the defendant." We deem it unnecessary to pass upon this contention as the case was tried by the court and the evidence in question may be disregarded and still we would be obliged to approve the finding of the court.

Defendant contends that the "plaintiff suffered no more than nominal damages." We cannot agree with this contention, and after a careful consideration of the evidence bearing upon the question of the damages, we have reached the conclusion that the finding of the trial court in relation thereto is sustained by the proof.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

36597

26 A

FRANK J. SHRINER,
Appellee,

v.

NATIONAL FIRE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 606

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in favor of plaintiff for the sum of $250 in a fourth class contract action in the Municipal court of Chicago. The case was tried by the court. Plaintiff has not filed a brief nor an appearance in this court.

The amended statement of claim alleges the issuance of a policy of insurance by defendant insuring plaintiff for one year from May 13, 1931, in the sum of $400, against loss suffered by theft of plaintiff's automobile; that the automobile was stolen April 27, 1932; that plaintiff, on April 28, 1932, gave defendant notice of the loss of the automobile and at the same time furnished defendant satisfactory proof of loss; that plaintiff had kept, performed, observed and complied with all the terms, provisions and conditions of the policy, and that there became due to plaintiff from defendant the sum of $400 under the policy. Attached to the statement of claim is a copy of the insurance policy.

The affidavit of merits alleges "that said supposed policy or certificate of insurance mentioned in the Amended Statement of Claim does not purport to be made to the plaintiff, and defendant did not therein or thereby insure the plaintiff,

[illegible]

[illegible]

[illegible]

but the plaintiff and said Commercial Finance Corporation therein mentioned, and any liability, if any, under said supposed contract, is not to the plaintiff alone, but to the plaintiff and the said Commercial Finance Corporation; and that there is a defect in parties plaintiff;" that the automobile was not stolen as alleged, and that plaintiff did not furnish proof of loss and has not kept, performed, observed or complied with all the terms, provisions and conditions of the policy.

We find no merit in the contention of defendant that the evidence is insufficient to show theft of plaintiff's car.

Defendant contends that the policy was void for breach of warranty or condition as to description and age of the car; that "the plaintiff having, by the terms of the policy, warranted that the description of the automobile was a 1930 Oldsmobile coach, purchased in May, 1931, used, for $425, and his evidence showing that the car was a 1929 Oldsmobile coach, purchased used in December, 1930, for $400, the evidence establishes a breach of such warranty and condition, which rendered the policy void, and the plaintiff cannot recover upon such evidence under his statement of claim." Defendant admits, as it must, that the defense of breach of warranty is not stated in the affidavit of merits, but contends that as defendant, upon cross-examination of plaintiff, developed the aforesaid facts in relation to the automobile, it should be entitled to the benefit of the defense, as the action in question is a fourth class contract case. We find no merit in this contention. The defense in question was not set forth nor relied upon in the affidavit of merits and it must therefore be considered as waived. No propositions of law nor instructions were submitted to the court by either party. If defendant, after the alleged facts were developed, desired to rely upon such defense, it had the right to ask the

but the plaintiff and with Commercial Finance Corporation therein mentioned, and no liability, if any, under such mortgaged machinery is not to the plaintiff alone, but to the plaintiff and the said Commercial Finance Corporation; and that there is a defect in parties plaintiff." Since the automobile was not stolen or eliminated and that plaintiff did not furnish proof of loss and loss not kept, performed or complied with all the terms, provisions and conditions of the policy.

We find no merit in the contention of defendant that the evidence is insufficient to show theft of plaintiff's car.

Defendant contends that the policy was void for breach of warranty or condition as to description and age of the car; that "the plaintiff having, by the terms of the policy, warranted that the description of the automobile was a 1930 Chevrolite coach, purchased in July, 1931, and, for hire, and the evidence showing that the car was a 1929 Chevrolite coach, purchased and in January, 1930, the evidence establishes a breach of such warranty and condition, which rendered the policy void, and the plaintiff cannot recover upon such evidence under his statement of claim." Defendant contends, as it must, that the failure of breach of warranty is not stated in the affidavit of merits, but contends that as defendant, upon cross-examination of plaintiff, corrected the statements and facts in relation to the automobile, it should be entitled to the benefit of the defense, as the action in question is a trial class contract case. We find no merit in this contention. The defense in question was not set forth nor relied upon in the affidavit of merits and it must therefore be considered as waived. No objections of law nor instructions were submitted to the court by either party. If defendant, after the alleged facts were disclosed, desired to rely upon such defense, it had the right to ask the

trial court for leave to amend its affidavit of defense. It did not do so; nor is there anything in the record that affirmatively shows that defendant, at any time during the trial, asserted and relied upon such defense. The instant contention seems to be an afterthought.

Defendant next contends that the policy provides that the insured shall, within sixty days after the loss, make sworn proof of loss, as provided in the policy, and as the plaintiff had not complied with this condition there could be no recovery under the policy. We find no merit in this contention for the reason that the trial court might well have found that defendant waived proofs of loss. Indeed, a finding that defendant, by its conduct, had prevented plaintiff from making proofs of loss would not have been unwarranted under the evidence.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Gridley and Sullivan, JJ., concur.

trial court; for I have to consider the sufficiency of evidence. It did not do so and nor do I have difficulty in the view that sufficiently above that determination, at any time during the trial, disclosed and relied upon such defence. The insured contention seems to be an afterthought.

Independent evidence that the policy provides that the insured should, within sixty days after the loss, make sworn proof of loss, as provided in the policy, and as the plaintiff had not complied with this condition there could be no recovery under the policy. We find no merit in this contention for the reason that the trial court which was more versed that determined weight proofs of loss. Indeed, it finding that determined, by its conclusion, had prevented plaintiff from making proofs of loss could not have been warranted under the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

"AFFIRMED."

Pratt and Sullivan, JJ., concur.

27 A

36764

NATIONAL LIFE INSURANCE COMPANY, (complainant),
Appellee,

v.

CELIA A. O'SHAUGHNESSY et al.,
Defendants.

E. WEINGARDEN,
Appellant.

INTERLOCUTORY
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

272 I.A. 606

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal, by E. Weingarden, from an interlocutory order of the Superior court of Cook county, entered on March 11, 1933, appointing a receiver upon a bill to foreclose certain premises.

The complainant filed, in this court, a motion to dismiss the appeal, and we reserved determination of the same until the final hearing of the cause.

It appears from the record that the appointment of the receiver was based upon the verified bill of complaint which did not make the appellant, Weingarden, a party to the same. About a month after the entry of the order appointing the receiver the appellant was granted leave to become a party defendant and thereupon filed an answer to the bill. Appellant then filed a motion to vacate the order appointing the receiver, which was denied, and the instant appeal, as we have heretofore stated, is from the order appointing the receiver. From the record presented to us upon the motion to dismiss this appeal, it appears that a final decree has been entered in the case, which finds, inter alia, "that the said E. Weingarden

[illegible]

[illegible]

[illegible]

has no interest in and to the said premises." Sec. 123 of the Practice Act, par. 122, ch. 110, Cahill's Ill. Rev. St. (1931), gives the right of appeal from an interlocutory order appointing a receiver in a foreclosure proceeding only to a person who has some interest in the premises in question. The appellant has not attempted to contest the motion of the complainant and it is plain that the appeal from the interlocutory order of March 11, 1933, appointing a receiver, must be dismissed, and it is accordingly so ordered.

MOTION OF COMPLAINANT TO DISMISS APPEAL ALLOWED.

Sullivan, P. J., and Gridley, J., concur.

has an interest in and is the said premises." (see, 110 of the Mortgage act, par. 110, sub. 110(1) (Cahill's 111. (see, 1. (1961)) gives the right of appeal from an interlocutory order appointing a receiver to a "mortgagee personally only in a person who has some interest in the premises in question. The applicant has not attempted to contest the action of the respondent and it is plain that the appeal from the interlocutory order of March 19, 1966, appointing a receiver, must be dismissed, and it is accordingly so ordered.

MOTION BY CONTRACTORS TO DISMISS INTO DISTRICT.

Cullinan, J.: I, and critchly, J.A. concur.

37015

THE MEDICAL PROTECTIVE COMPANY,
a Corporation,
Appellee,

vs.

McCABE AND SONS REAL ESTATE
IMPROVEMENT CORPORATION, a
Corporation, et al.,
Defendants.

Appeal of McCABE AND SONS REAL
ESTATE IMPROVEMENT CORPORATION,
a Corporation, Appellant, from
Interlocutory Order Appointing
a Receiver.

APPEAL FROM INTERLOCUTORY
ORDER OF THE CIRCUIT COURT
OF COOK COUNTY.

272 I.A. 607

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from an interlocutory order appointing a receiver in a foreclosure proceeding.

The first point made is that the bill is not properly verified. The verification reads: "and the same is true, except as to such matters alleged to be on information and belief, and as to such matters this affiant believes them to be true." This form has been approved in a number of cases. Hulse v. Nash, 332 Ill. 500.

It is next urged that it was reversible error to order that the bond of the complainant be fixed at $200 without fixing any time limit for filing it. The order was entered July 28, 1933, and by a supplemental record filed in this court it appears that the complainant's bond was filed August 8th. In Haugen v. Carr, 263 Ill. App. 333, the order appointing a receiver was entered July 31, 1931, and complainants were required to file a bond, which was not filed until August 11th. The court held that the fact that the complainant's bond was not filed until a few days after the receiver's bond was filed is a mere irregularity of no consequence. A similar situation was presented in Chicago Title & Trust Co. v. Johnson, 268 Ill. App. 184, where there was no time limit specified in the order for filing complainant's bond; some days after the order was

[illegible]

THE BRITISH PROTECTIVE ASSOCIATION,
a corporation,
Appellee,

vs.

MARGARET ANN [illegible]
INDEPENDENT CONSTRUCTION, a
corporation, et al.,
Defendants.

Appeal of Motion and Order Sign.
BRITISH INDEPENDENT CONSTRUCTION,
a corporation, Appellant, from
interlocutory Order Dismissing
a Receiver.

272 I.A. 607

MR. JUSTICE SCHWARZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by INDEPENDENT from an interlocutory order dismissing a receiver in a foreclosure proceeding.

The first point made is that the bill is not properly verified. The verification reads: "and the same is true, except as to such matters alleged to be on information and belief, and as to such matters affiant believes them to be true." This form has been approved in a number of cases. Quinn v. Kane, 374 Ill. 80.

It is next urged that it was reversible error to order that the bond of the complainant be filed at $500 without fixing any time limit for filing it. The order was entered July 22, 1932, and by a supplemental record filed in this court it appears that the complainant's bond was filed August 4th. In Cannon v. Cort, 263 Ill. App. 332, the order appointing a receiver was entered July 22, 1931, and complainants were required to file a bond, which was not filed until August 11th. The court held that the fact that the complainant's bond was not filed until a few days after the receiver's bond was filed is a mere irregularity of no consequence. A similar situation was presented in Quinn Villa & Trust Co. v. Johnson, 263 Ill. App. 174, where there was no time limit specified in the order for filing complainant's bond; seven days after the order was

entered the bond was filed and approved. The court held that this was not reversible error; that the record showed that the defendant made no objection to the order nor called any supposed defects with respect to the bond to the attention of the chancellor, but perfected his appeal without making any complaint. See also, Anderson v. Hultberg, 117 Ill. App. 231. All of these cases involved the appointment of a receiver and are against defendants' contention on this point.

The cases cited by defendants are not in point. In Lichtstern v. Rosenbaum Grain Co., 176 Ill. App. 250, it was held that it was erroneous to issue a temporary injunction effective any time thereafter when the complainant might see fit to file a bond. Virtually this same situation obtained in Blaurock v. Gabel Packing Co., 254 Ill. App. 607.

It is next asserted as error that while the trustee in the trust deed sought to be foreclosed was a party to the proceeding, yet it was not notified of the motion for the appointment of a receiver. The owner of the property was notified and appeared in court by counsel to oppose the motion. It was unnecessary to serve notice upon the trustee whose rights and interests in the matter were identical with those of the owner of the mortgage indebtedness. The trustee is not complaining because he was not notified, and we do not see how the defendant, the owner of the property, can make this point on behalf of the trustee. Citizens Trust & Savings Bank v. Blair, 254 Ill. App. 608, does not support defendant's point. There was a bill filed to foreclose a trust deed in which the trustee was not made a party and the order appointing the receiver was held invalid for the reason that the trustee was not a party to the foreclosure proceedings and that it was a necessary party; citing Rodman v. Quick, 211 Ill. 546. In Davis v. Blair, 252 Ill. App. 417, the court was passing upon the appointment of a receiver

stated the book was TIAC was injured. The court held that this was not reversible error; that the trial judge had the defendant made no objection to the order nor called any supposed defects with respect to the bond to the attention of the commissioner, but preferred his appeal without making any complaint. See also, Martinez v. Martinez, 117 Ill. App. 2d. All of these cases involved the appointment of a receiver and are against defendants' contention in this point.

The cases cited by defendants are not in point. In Bigelow v. Investment Corp., 175 Ill. App. 2d., it was held that it was erroneous to issue a temporary injunction effective any time thereafter when the complainant might see fit to file a bond. Similarly this same distinction obtained in Clarence v. Dodge Tractor Co., 98 Ill. App. 677.

It is most important to note that while the trustee in the instant case sought to be terminated was a party to the proceeding, yet it was not notified of the motion for the appointment of a receiver. The owner of the property was notified and appeared in court by counsel to oppose the motion. It was unnecessary to serve notice upon the trustee whose rights and interests in the matter were identical with those of the owner of the mortgage indebtedness. The trustee is not complaining because he was not notified, and we do not see how the defendant, the owner of the property, can make this point on behalf of the trustee. Gilmore Trust v. Illinois Tool Co./State, 101 Ill. App. 2d, have not supported defendant's point. There was a bill filed to foreclose a trust deed on which the trustee was not made a party and the order appointing the receiver was held invalid for the reason that the trustee was not a party to the foreclosure proceedings and that it was a mandatory party; citing Dodge v. Dodge, 22 Ill. 2d. In Mueller v. Mueller, 20 Ill. App. 417, the court was passing upon the appointment of a receiver

without notice to the owner. None of these cases is applicable to the instant situation, where the trustee was a party to the foreclosure proceedings and the owner was notified of the motion for the appointment of a receiver.

We find no merit in the points raised by defendant, and the interlocutory order is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

without notice to the owner. Some of these cases is outlining to the lawful situation, where the trespass has a party to the dispute investigation and the owner was notified of his behalf for the enforcement of a warrant.

We find no merit to the points raised by defendant, and the judgmentmentry order is affirmed.

AFFIRMED.

Malahoff, C. J., and O'Connor, J., concur.

36223

56

A

In RE: ESTATE OF MIKE JANDRICH, also known as Mike Janolic, also known as Mike Janlic, Deceased.

On Appeal of THE CATHOLIC BISHOP OF CHICAGO, (Proponent) Appellant,

v.

THE SOUTH CHICAGO SAVINGS BANK, Admr. and ANA MAJETIC and KATE NIKOLIC, Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

272 I.A. 607

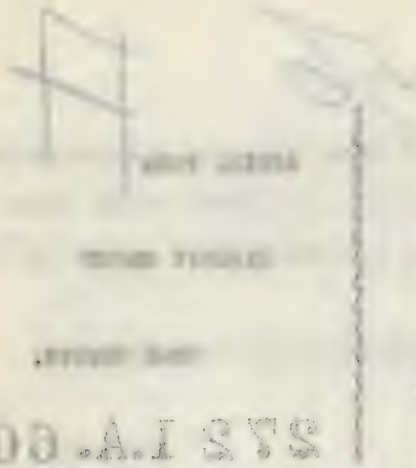
Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, denying probate of the alleged lost or destroyed will of one Mike Jandrich, deceased.

Testimony of the alleged making, signing and loss of the will was presented to the Probate Court, and on such testimony the will was ordered admitted to probate. On appeal to the Circuit Court, the cause was submitted to the court upon a stipulation entered into between the parties to the effect that the testimony taken and heard in the Probate Court should be heard in the Circuit Court. After a hearing, the Circuit Court entered an order denying probate of the alleged will, from which order this appeal is prayed.

Eli N. Pochucha testified that he was a real estate dealer and insurance agent in South Chicago; that he is a notary public, and that on March 10th, 1926, he was requested by one Joe Jandrich to go with him to the South Chicago Hospital for the purpose of drawing a will for one Mike Jandrich, the decedent; that when he arrived at the hospital he found Mike Jandrich lying in bed and suffering from pneumonia; that the witness had known Mike Jandrich before this time; that the witness had with him a blank printed form of will, and that he proceeded to draw a will for Mike Jandrich. This witness further testified that Mike Jandrich informed the witness that he, Jandrich,



This is an appeal from an order of the Circuit Court of Cook County, denying probate of the alleged last or testamentary will of one Ella Jordick, deceased.

Testimony of the alleged making, signing and loss of the will was presented to the Probate Court, and on such testimony the will was ordered admitted to probate. On appeal to the Circuit Court, the case was submitted to the court upon a stipulation entered into between the parties to the effect that the testimony taken and heard in the Probate Court should be heard in the Circuit Court. After a hearing, the Circuit Court entered an order denying probate of the alleged will, from which order this appeal is prayed.

Eli R. Sommers testified that he was a real estate dealer and insurance agent in South Chicago; that he is a notary public, and that on March 10th, 1906, he was requested by one Joe Jordick to go with him to the South Chicago Hospital for the purpose of drawing a will for one Ella Jordick, the decedent; that when he arrived at the hospital he found said Jordick lying in bed and suffering from pneumonia; that the witness had known Ella Jordick before this time; that the witness had with him a blank printed form of will, and that he proceeded to draw a will for Ella Jordick. This witness further testified that Ella Jordick informed the witness that he, Jordick,

had $5,000.00 in the South Chicago Savings Bank, $2,500.00 of which, in the event of his death, he desired to leave to the Most Sacred Heart of Jesus Church, a Roman Catholic church in South Chicago, and the balance, together with certain insurance money, to his sister and half sister in Jugoslovakia. The witness testified that he then drew the will as requested, and at the request of Mike Jandrich signed the name of Mike Jandrich to the will and that Mike Jandrich then made his mark. The witness further testified that he, Joe Jandrich, and a nurse, whose name the witness did not recall, signed the will as witnesses. Pochucha further testified that the alleged testator was at this time of sound mind and memory; that he, Pochucha, never saw Mike Jandrich after the will was signed and witnessed, although Jandrich lived for more than two years afterward; that the witness took the will as executed by the testator to his, Pochucha's, office and put it in a letter file, and that in January, 1938, he cleaned out the letter file and burned the Jandrich will. What was claimed by this witness to be a copy of the alleged will, which the witness, Pochucha, testified that he had burned, and which copy the witness made from memory, was received in evidence, and is in words and figures as follows:

> "I, Mike Jandrich of Chicago, in the County of Cook and the State of Illinois, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do hereby make, ordain, publish and declare this to be my Last Will and Testament;
>
> First, I order and direct that my Executor hereinafter named pay all my just debts and funeral expense as soon after my decease as conveniently may be.
>
> Second: After the payment of such funeral expenses and debts, I give, devise and bequeath to the Most Sacred Heart of Jesus Roman Catholic Creation Parish, at 96th Street and Exchange Avenue, Chicago, Illinois, the sum of Two Thousand Five Hundred Dollars ($2,500.00). I further give, devise and bequeath unto Lucia Jandrich, the benefit in my employer's benefit insurance in the International Harvester Company (Wisconsin Steel Company Works).

been $2,000.00 in the Bank Chicago Savings Bank, $2,000.00 of which, in the event of his death, he desired to leave to the Near Eastern Society of Foreign Missions, a Roman Catholic church in Port Said, Egypt, and the balance, equally with certain Lawrence Avenue, in the Bronx and half sister in Jacksonville. The witness testified that he then knew the will to be genuine, and at the request of the testator signed the name of this witness to the will and that this testator then made his mark. The witness further testified that he, Joe Fustick, and a nurse, whose name the witness did not recall, signed the will as witnesses. Fustick further testified that the alleged testator was of this state of mental and memory; that he, Fustick, never saw this testator after the will was signed and witnessed, although testator lived for many days but he never ascertained that the witness took the will as executed by the testator to his "Cousin", either and put it in a letter file, and that it remained, and he cleaned out the letter file and burned the Fustick will. That was claimed by this witness to be a copy of the alleged will, which the witness, Fustick, testified that he had burned, and which copy the witness made from memory, was received in evidence, and is in words and figures as follows:

"I, this testator of Chicago, in the County of Cook and the State of Illinois, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do hereby make, publish and declare this to be my last will and testament:

First, I order and direct that my executor hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

Second: After the payment of such funeral expenses and debts, I give, devise and bequeath to the last named first of these lands situate, lying and being in Bronx County, State of New York, Jacksonville, Florida, the son of the deceased Chicago Savings Bank, Chicago, Illinois. I leave give, devise and bequeath unto Joseph Fustick, the family in my mother's maiden surnamed in the International Novelty Company (deceased) that belong to Joseph.

I further give, devise and bequeath unto my married sister, Ana Majetic, of Waganac, Jugo Slavia, and unto my half sister Kate Nikolic of Jugo Slavia, all the residue of my estate, share and share alike.

Lastly, I make, constitute and appoint Mike Spehar, of Chicago, to be the executor of this, my last Will and Testament, hereby requesting and directing that no surety be required on his Bond as such Executor.

I hereby revoke all former Wills and Codicils by me made.

In Witness Whereof I have hereunto subscribed my name;this 10th day of March in the year of our Lord, One Thousand Nine Hundred Twenty Six (A.D. 1926).

his

Mike X Jandrich (Seal)

mark

This instrument was on the day of the date thereof signed, published and declared by the said testator Mike Jandrich to be his last Will and Testament in the presence of us who at his request and in his presence and in the presence of each other, have subscribed our names hereto as witnesses.

E. N. POCHUCHA,
JOSEP JANDRICH.
- - - - - - - - WITNESS NAME UNKNOWN.'

On cross-examination, when the attention of the witness was called to the fact that he might be punished for destroying the alleged will, he stated that this destruction was accidental. The witness further testified that he heard that Mike Jandrich died about April 19th, 1928, but that the will had been destroyed prior to that date.

Mike Glasiniak, a real estate salesman living in South Chicago, testified that in April, 1926, he met Mike Jandrich, shortly after Jandrich had left the hospital, and that Mike Jandrich told this witness that while in the hospital, he, Mike Jandrich, had made a will by which he left $3,500.00 to the church, that his sisters had a farm in the old country, and that he left his insurance money to Lucy Jandrich, the wife of Joe Jandrich, one of the witnesses in this case for the petitioner.

Joe Jandrich testified on the hearing that on March 10th,

1926, he visited Mike Jandrich in the hospital and took a priest with him; that subsequent to that time and about three quarters of an hour later, he took Pochucha to the hospital to see Mike Jandrich, the testator, and found Mike Jandrich in bed; that Pochucha made out a will for Mike Jandrich, and that Mike Jandrich signed it with his cross, and that this witness and a nurse signed it as witnesses. This witness further testified that Pochucha read the will to Mike Jandrich in the presence of the witnesses, and that Mike Jandrich said it was all right. The only testimony as to the date of the death of Mike Jandrich is the statement made on cross-examination by the witness, Pochucha, who claimed to have drawn and destroyed the alleged will, to the effect that this witness heard that Jandrich died on April 19th, 1928, more than two years after the alleged will was made, and over three months after the will was destroyed.

It is generally held to be the rule that unless an alleged will is shown to have been in existence at the time of the decedent's death, the presumption arises that the will, if it ever existed, was destroyed by or with the knowledge and direction of the alleged testator. In the instant case, however, according to the testimony adduced, the alleged will was never in the physical possession of the alleged maker after its execution, so that if there ever was such a document, the decedent had no opportunity to destroy it. However, the testimony as to the making, executing and destruction of this supposed will is not convincing. It is claimed that there were three witnesses to this supposed will, Pochucha, who testified that he drew it, Joe Jandrich, whose wife is one of the beneficiaries, and a nurse, who was not produced, and whose absence in unexplained.

In addition to these claimed witnesses to the will, the proponents produced one Mike Glasniak, who testified that in March, 1926, five years prior to his giving his testimony, he had met Mike Jandrich on the street, and that Jandrich told the witness about his

1800, he visited Lincoln Junction in the hospital and took a walnut with him; that subsequent to that time and about three months of an hour later, he took Lorenzo to the hospital to see Clem Jordan, the testator, and found Clem Jordan in full view recognizing and a will for Clem Jordan, and that Clem Jordan signed it with his name, and that this witness and a second signed it as witnesses. This witness further testified that Lorenzo said he will be Clem Jordan's in the presence of Clem witnesses, and that Clem Jordan with it was all right. The only testimony which the heirs of the death of Clem Jordan is the statements made on cross-examination by the witness, Lorenzo, who claimed to have seen and destroyed the alleged will, to the effect that Clem witness Jordan that Jordan had no legal 1800, more than two years after the alleged will was made, and even three months after the will was destroyed.

It is generally held to be the rule that unless an alleged will is known to have been in existence at the time of the decedent's death, the presumption arises that the will, if it ever existed, was destroyed by or with the knowledge and direction of the alleged testator. In the instant case, however, according to the testimony adduced, the alleged will was never in the physical possession of the alleged maker after its execution, so that if there ever was such a document, the decedent had no opportunity to destroy it. However, the testimony as to the making, execution and destruction of this document will is not convincing. It is claimed that there were three witnesses to this purported will, Dunham, who testified that he drew it, Lee Fletcher, whose wife is one of the beneficiaries, and a nurse, who was not produced, and their absence is unexplained.

In addition to these claimed witnesses to the will, the proponents produced one Mike Glennick, who testified that in March, 1900, five years prior to his giving his testimony, he had met Clem Jordan on the street, and that Jordan told the witness about his

will and in detail the manner in which he, Jandrich, had disposed of his property. Pochucha, the draftsman, testified that he never saw Mike Jandrich after the will was executed. He was asked if he had been paid for his work, and he said no, but that Jandrich told the witness that if he lived, he would call on the witness. Jandrich lived more than two years after it is said that he signed this document, and during this time the witness never saw him, nor communicated with him.

We see nothing in the case presented by appellants which would justify this court in reversing the judgment of the trial court. Therefore, the judgment is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

36233

57 4

LEXINGTON - CHICAGO BUILDING CORPORATION, a Corporation, Appellant, v. HUDSON MOTOR COMPANY OF ILLINOIS, a Corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 607

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against plaintiff for costs in a suit by plaintiff against defendant for rent alleged to be due under a written lease. The judgment was entered on the verdict of a jury.

On May 1st, 1929, plaintiff leased to defendant certain premises in the City of Chicago for term beginning May 1st, 1929 and ending April 30th, 1930, the premises to be used for the sale and repair of automobiles, for a rental of $11,523.48, payable in monthly installments of $960.29 in advance on the first of each month, at the First National Bank, Connersville, Indiana. By this lease, it was agreed that the lessee would have the right to renew the lease for a further term of two years, provided the lessee gave to the lessor a written notice of its election to so renew, sixty days prior to the expiration of the term. The record shows that on March 10th, 1930, the president of the plaintiff company wrote to defendant, calling defendant's attention to the fact that its lease of the premises in question would expire on May 1st, 1930, and asked defendant if plaintiff was right in assuming that defendant would continue to want the building, and further that plaintiff would be glad to have defendant continue in its occupancy. In reply, on March 12th, 1930, defendant wrote to plaintiff, that if plaintiff would have a new lease made incorporating the "same details" as shown on the lease

[illegible]

INTERTOWN - VILLAGE MOTELMAT CORPORATION, a corporation, Appellant, v. ROCCO MOTOR COURT OF ILLINOIS, a Corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 27, 1958

MR. PRESIDING JUSTICE MCCORMICK DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Municipal Court of Chicago granted plaintiff for costs in a suit by plaintiff against defendant for unpaid alleged to be due under a written lease. The judgment was entered on the verdict of a jury.

On May 1st, 1955, plaintiff leased to defendant certain premises in the City of Chicago for term beginning May 1st, 1955 and ending April 30th, 1960, the premises to be used for the sale and repair of automobiles, for a rental of $12,282.48, payable in monthly installments of $205.38 in advance on the first of each month, at the First National Bank, Connersville, Indiana. By this lease, it was agreed that the lessee would have the right to renew the lease for a further term of two years, provided the lessee gave to the lessor a written notice of its election to so renew, sixty days prior to the expiration of the term. The record shows that on March 10th, 1960, the president of the plaintiff company wrote to defendant, calling defendant's attention to the fact that its lease of the premises in question would expire on May 1st, 1960, and asked defendant if plaintiff was right in assuming that defendant could continue to want the building, and further that plaintiff would be glad to have defendant continue in its occupancy. In reply, on March 15th, 1960, defendant wrote to plaintiff, that if plaintiff would have a new lease made incorporating the "same details" as shown on the lease

held by defendant, that defendant would sign and return such new lease, provided that instead of a two year term, defendant have the new lease "on a year to year basis". It further appears from the record that this letter was lost or destroyed by fire, as indicated by a telegram from plaintiff to defendant, and on April 18th, 1930, defendant sent plaintiff a copy of the letter of March 12th, 1930, in which defendant had stated that it would retain possession of the premises in question, provided the lease were renewed on "a year to year basis." After having written and telegraphed plaintiff a number of times and receiving no answer, the defendant on June 6th, 1930, wrote plaintiff a letter in which it stated that defendant had written letters to plaintiff on March 12th, April 10th and April 18th, 1930, with reference to a renewal of the lease, and particularly with reference to defendant's proposition that it desired to have the lease renewed on "a year to year basis", as indicated by its letter to plaintiff of March 12th, 1930.

It seems that between March 12th, 1930, and June 6th, 1930, one Schmidt, an attorney at law, representing the plaintiff company and various representatives of defendant company, had conversations concerning the renewal of the lease on the terms suggested by defendant, to-wit: "on a year to year basis"; that Schmidt was told by an officer of defendant that defendant would not renew the lease for more than a year, and that Schmidt stated that he was concerned about a mortgage on the premises which would fall due on April 15th, 1930, and suggested to Earl L. Ferguson, an officer of defendant company, that defendant should renew the lease for a period of two years with an option on the part of defendant to cancel at the end of one year, provided defendant gave ninety days notice of its intention, to which proposition Schmidt testified defendant, by its officer, assented. Schmidt further testified that on June 10th, 1930, he had a further conversation with Ferguson, in which Schmidt told Ferguson

held by defendant, that defendant would sign and return such new lease, provided that instead of a two year term, defendant have the new lease "on a year to year basis". It further appears from the record that this letter was lost or destroyed by fire, as indicated by a telegram from plaintiff to defendant, and on April 12th, 1930, defendant sent plaintiff a copy of the letter of March 12th, 1930, in which defendant had stated that it would retain possession of the premises in question, provided the lease were renewed on "a year to year basis." After having written and telegraphed plaintiff a number of times and receiving no answer, the defendant on June 5th, 1930, wrote plaintiff a letter in which it stated that defendant had written letters to plaintiff on March 12th, April 10th and April 12th, 1930, with reference to a renewal of the lease, and particularly with reference to defendant's proposition that it desired to have the lease renewed on "a year to year basis", as indicated by its letter to plaintiff of March 12th, 1930.

It seems that between March 12th, 1930, and June 5th, 1930, one Schmidt, an attorney at law, representing the plaintiff company and various representatives of defendant company, had conversations concerning the renewal of the lease on the terms suggested by defendant, to-wit: "on a year to year basis"; that Schmidt was told by an officer of defendant that defendant would not renew the lease for more than a year, and that Schmidt stated that he was concerned about a mortgage on the premises which would fall due on April 15th, 1930, and suggested to Karl L. Ferguson, an officer of defendant company, that defendant should renew the lease for a period of two years with an option on the part of defendant to cancel at the end of one year, provided defendant gave ninety days notice of its intention, to which proposition Schmidt testified defendant, by its officer, assented. Schmidt further testified that on June 10th, 1930, he had a further conversation with Ferguson, in which "Schmidt told Ferguson

that he, Schmidt, would prepare a lease with the terms suggested and submit it to the attorney for defendant.

From the record, it appears that on June 18th, 1930, the following letter was sent to the defendant company:

"June 18, 1930

Mr. E. L. Ferguson,
Hudson Motor Company of Illinois,
3220 S. Michigan Avenue,
Chicago, Illinois

Dear Sir:

Please be advised that we have prepared a lease to the Wabash Avenue premises from Lexington-Chicago Building Corporation to yourselves, for a period of two years beginning May 1, 1930, and ending April 30, 1932, at the same rental and upon the same terms and conditions as are provided in the former lease. In accordance with your request, and assented to by Mr. Rickert, this lease will provide that it may be cancelled by you at the end of the first year, upon giving ninety days' written notice of your intention so to do. Your attorney, Mr. Cowburn, has requested me to submit this lease to him for his approval, which will be done immediately.

We enclose herewith copy of a letter received from the Glen Falls Indemnity Company, which covers the public liability risk on the said premises, calling attention to certain repairs or alterations that should be made on those premises to minimize the possibility of accident. In the past such matters have been cared for by your Mr. Silvis, and we will appreciate it very much if Mr. Silvis will let us have his ideas on the recommendations in said letter.

Very Truly yours,

TANNEBAUM, POLIKOFF & SCHMIDT
By

JBS:BD"

Schmidt testified to various other conversations with representatives of defendant company, which culminated in a refusal by defendant to sign a new lease for a period exceeding one year. From the record it appears that various propositions of settlement based on a cancellation of the lease were discussed between the parties without result, and on August 22nd, 1930, the attorney for defendant wrote the attorneys for the plaintiff the following letter:

that he, Schmidt, would resume a lease with the terms suggested and submit it to the attorney for defendant.

From the record, it appears that on June 18th, 1920, the following letter was sent to the defendant company:

"June 16, 1920

Mr. E. L. Pressman,
Indiana Motor Speedway of Illinois,
Room 5, Michigan Avenue,
Chicago, Illinois

Dear Sir:

Please be advised that we have received a lease to the tenant, Frank Schmidt, for the Lexington-Illinois building corporation to Tuesday, for a period of two years beginning on 1, 1920, and ending June 30, 1922, at the same rent-1 and upon the same terms and conditions as are provided in the lease here. In connection with your account, and addressed to Mr. Schmidt, this lease will provide that it may be cancelled by you at the end of the first year, upon giving ninety days' written notice of your intention so to do. Your attorney, Mr. Cantrell, has requested me to submit this lease to him for his approval, which will be done immediately.

We enclose herewith copy of a letter received from the Lake Tells Indemnity Company, which covers the public liability risk on the said premises, calling attention to certain requirements of objectives that should be made on these premises to minimize the possibility of accidents. In the past such matters have been carried for by your Mr. Sylvia, and we will appreciate it very much if Mr. Sylvia will let us have his views on the recommendations in said letter.

Very truly yours,

Harrison, Holbrook & Wright

By

HHW:MM"

Schmidt testified to various other conversations with representatives of defendant company, which culminated in a refusal by defendant to sign a new lease for a period exceeding one year. From the record it appears that various propositions of settlement based on a compromise of the issue were discussed between the parties without result, and on August 23rd, 1920, the attorney for defendant wrote the attorneys for the plaintiff the following letter:

"Walter Cowburn
Lawyer
First National Bank Building
38 South Dearborn Street,
Chicago

August 22, 1930

Attention: Mr. Schmidt,
Tannenbaum, Poliroff & Schmidt,
111 W. Washington St.,
Chicago, Ill.

Gentlemen: In re: Hudson Motor Company Lease

Since our last conversation with reference to the lease of the premises located at 2234 Wabash Avenue, owned by the Lexington Chicago Building Corporation, and after a rather exhaustive search of the authorities, I have arrived at the conclusion that the Hudson Motor Company of Illinois is occupying the above premises as a tenant from month to month.

In accordance with this decision, we are today forwarding to the Lexington Chicago Building Corporation a notice to the effect that we will terminate our tenancy to said premises on the 30th day of September, 1930, and I am enclosing herewith a copy of said notice for your convenience.

Yours very truly,
Walter Cowburn".

It also appears that defendant remained in possession of the demised premises until about October 1, 1930, when defendant moved. The rent was paid up to October 1st, 1930, and the suit is for $960.39, the rent for the month of October, 1930.

The only question for this court to determine is whether or not as a matter of law the conduct of the defendant and the receipt of rent by the plaintiff constitute a holding over by the tenant for a year under the terms of the written lease, and makes defendant liable for the rent for the year.

In Clinton Wire Cloth Co., v. Gardner, et al. 99 Ill. 151, the Supreme Court said:

"In the opinion of the court * * * the law is too well settled to be disputed, that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of a prior lease."

In this case, the court quotes with approval Taylor's Landlord and Tenant, 7th Ed. Sec. 22, as follows:

Walter Dunham
Lawyer
First National Bank Building
32 South Dearborn Street,
Chicago

August 22, 1930

Attention: Mr. Connell,
Treasurer, Pollkart & Company,
111 N. Washington Ave.,
Chicago, Ill.

Gentlemen: In re: Chicago Outer Theater Lease

Since our last conversation with reference to the lease of the premises located at 5555 Twelfth Avenue, owned by the Lexington Chicago Building Corporation, and after a further examination among of the documents, I have received at the suggestion that the Chicago Outer Company of Illinois is occupying the above premises on a tenancy from month to month.

In accordance with this decision, we are today forwarding to the Lexington Chicago Building Corporation a notice to the effect that we will terminate our tenancy on said premises on the 30th day of September, 1930, and I am enclosing herewith a copy of said notice for your convenience.

Yours very truly,
Walter Dunham.

It also appears that defendant remained in possession of the demised premises until about October 1, 1930, when defendant moved. The rent was paid up to October 1st, 1930, and the suit is for $900.00, the rent for the month of October, 1930.

The only question for this court to determine is whether or not as a matter of law the conduct of the defendant and the receipt of rent by the plaintiff constitute a holding over by the tenant for a year under the terms of the written lease, and makes defendant liable for the rent for the year.

In Clinton City Club Co., v. Cardner, 65 Ill. App. 121, the Supreme Court said:

"In the opinion of the court ^ ^ ^ the law is too well settled to be disputed, that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of a prior lease."

In this case, the court cited with approval Taylor's Landlord and Tenant, 7th Ed. Sec. 36, as follows:

> "A tenant for years who holds over after the expiration of his term without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser, or a tenant at the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election and make the occupant his tenant. But the tenant has no such election; his mere continuance in possession fixes him as tenant for another year, if the landlord thinks proper to insist upon it. And the right of the landlord to continue the tenancy will not be affected by the fact that the tenant refused to renew the lease, and gave notice that he had hired other premises."

In this state, there has been no deviation from this rule. The legal status of defendant which is established by its holding over, makes it liable for the rent for the year following the expiration of the lease on April 30, 1930. Under the facts adduced in this case, the court should have directed a verdict for plaintiff.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON AND HEBEL, JJ. CONCUR

"A member of police who holds over after the expiration of his term without paying with or observing accordingly a requirements of the statute, because either a temporary, or a remark is the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to constitute his election and make the occupant his tenant. But the tenant has no such election; his mere continuance in possession does no harm for another year, if the landlord thinks proper to insist upon it. And the right of the landlord to continue the tenancy will not be affected by the fact that the tenant relented in terms the lease, and gave notice that he had adopted other premises."

In this state, there has been no deviation from this rule. The legal status of defendants should be modified by the holding over, make it liable for the rent for the year following the expiration of the lease on April 30, 1900. Under the issues submitted in this case, the court should have directed a verdict for plaintiff.

The judgment of the municipal court is reversed and the cause remanded.

MESSRS. AND MADAMES.

WILSON AND WILSON, for appellant.

36343

GUY HOWE,

Appellee,

v.

KONSTANTY KOWALSKI,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

58

272 I.A. 607

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against defendant for $200.00 in a suit brought by plaintiff against defendant to recover for alleged damages to plaintiff's automobile.

On December 21st, 1930, plaintiff and defendant were driving their cars in opposite directions on a curve on a paved state highway. Plaintiff testified that he had just got on the pavement; that the pavement was very icy and slippery; that he had proceeded about 100 feet on the curve at a speed of 10 miles an hour when defendant's car come around the curve toward plaintiff skidding and turning end for end; that defendant's car turned around three or four times and struck plaintiff's car, causing the damage complained of. Plaintiff further testified that when he saw defendant coming toward him in the manner described, he drove off the pavement so that at the time his car was struck, plaintiff's right wheels were on the grass on the right side of the pavement. Plaintiff also testified that after the accident defendant had stated that when his, defendant's, wheels began to slip, he speeded up in order to avoid the accident.

Defendant does not deny any of the statements made by plaintiff except that he states that his car turned around only once, which if true, seems to have been often enough.

Opinion filed Oct. 26, 1928

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the municipal court of Chicago against defendant for $500.00 in a suit brought by plaintiff against defendant to recover for alleged damages to plaintiff's automobile.

On December 21st, 1926, plaintiff and defendant were driving their cars in opposite directions on a curve on a paved state highway. Plaintiff testified that he had just got on the pavement; that the pavement was very icy and slippery; that he had proceeded about 100 feet on the curve at a speed of 20 miles an hour when defendant's car came around the curve toward plaintiff skidding and turning end for end; that defendant's car turned around three or four times and struck plaintiff's car, causing the damage complained of. Plaintiff further testified that when he saw defendant coming toward him in the manner described, he drove off the pavement as that at the time his car was struck, plaintiff's right wheels were on the grass on the right side of the pavement. Plaintiff also testified that after the accident defendant had stated that when his defendant's wheels began to slip, he speeded up in order to avoid the accident.

Defendant does not deny any of the statements made by plaintiff except that he states that his car turned around only once, which if true, seems to have been often enough.

Plaintiff offered in evidence, and the court received a bill paid by him for repairs to plaintiff's car, to which objection was made. It is not claimed by defendant that the charge is excessive, but the complaint is made that it is not shown that the amount charged was fair and reasonable.

In Cloyes v. Plastic, 231 Ill. App. 183, this court held that "what plaintiff paid for repairs was sufficient to warrant the recovery by him of such sum without any further evidence, since nothing appeared to cast suspicion on the transaction between plaintiff and the garage company, and, therefore, it will be presumed that the charge made was reasonable." (Citing various cases.)

The record shows that defendant stated to plaintiff that defendant's car had skidded shortly before the accident; that defendant had righted the car. Defendant, however, had not slackened his speed sufficiently to prevent the car from skidding again, thus causing the accident, resulting in the damage to plaintiff's car.

There is nothing in the record which would justify a reversal. The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

Plaintiff offered in evidence, and the court received a bill paid by him for repairs to plaintiff's car, in which objection was made. It is not claimed by defendant that the charge is excessive, but the contention is made that it is not shown that the amount charged was fair and reasonable.

In Ebbers v. Fidelity, 221 Ill. App. 347, this court held that "what plaintiff paid for repairs was sufficient to warrant the recovery by his of such sum without any further evidence, since nothing appeared in most mitigation or the transaction between plaintiff and the garage company, and, therefore, it will be presumed that the charge made was reasonable." (Citing certain cases.)

The record shows that defendant stated to plaintiff that defendant's car had skidded shortly before the accident; that defendant had rights the car. Defendant, however, had not claimed his speed sufficiently to prevent the car from skidding again, thus causing the accident, resulting in the damage to plaintiff's car.

There is nothing in the record which would justify a reversal. The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

KERNER AND STONE, JJ., CONCUR.

59

36252

ALFRED E. KAHN,
(Plaintiff) Appellee,
v.
WALTER STARCK,
(Defendant) Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

272 I.A. 608

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for $346.35, against defendant in a suit brought to recover damages to plaintiff's automobile, caused by defendant's alleged negligence. Appellee has filed no brief.

On May 14th, 1933, at about 6 P.M., plaintiff was driving his automobile north on the outer drive of Lincoln Park, adjacent to the curb at the west side of the outer drive. Defendant was driving his car in the same direction at a short distance east of and in close proximity to plaintiff's car.

Plaintiff testified that suddenly, and without warning, the left bumper on the rear of defendant's car caught the front of plaintiff's car, threw plaintiff's car over the west curb of the drive and into and demolished a concrete lamp post, injuring plaintiff and damaging his car. His testimony and that of the automobile repair man who repaired the car are both to the effect that plaintiff's car was badly damaged. The amount of such damage and the cost of the repairs is not disputed. Defendant did object to the court admitting the bill for repairs as evidence of the amount of damage.

Defendant testified that as he was driving north alongside plaintiff's car, another car which was going north at the right of and adjacent to defendant's car, swung into and against defendant's car, thus causing defendant's car to swerve to the

[illegible]

[illegible] v. [illegible],

[illegible] Plaintiff-Appellee,

v.

[illegible] Defendant-Appellant.

[illegible]

[illegible] Opinion filed Jan. 31, 1951

[illegible] Plaintiff's automobile was damaged when it collided with the defendant's car. This is an appeal from a judgment of the municipal court of Chicago for $[illegible], against defendant in a suit brought to recover damages for plaintiff's automobile, caused by defendant's alleged negligence. Judgment has filed no brief.

On May 14th, 1950, at about 8 A.M., plaintiff was driving his automobile south on the Outer Drive at Jackson Park, returned to the north to the lower side of the Outer Drive, defendant was driving his car in the same direction a short distance ahead of and in slower proximity to plaintiff's car.

Plaintiff testified that suddenly, and without warning, the left bumper on the rear of defendant's car struck the front of plaintiff's car, thrown plaintiff's car back the west curb of the Drive and into and demolished a concrete lamp post, injuring plaintiff and damaging his car. His testimony and that of the automobile repair man who repaired the car are both to the effect that plaintiff's car was badly damaged. The amount of such damage was the sum of the repairs is not disputed. Defendant did object to the court admitting the bill for repairs as evidence of the amount of damage.

Defendant testified that as he was driving north along side plaintiff's car, another car which was going north at the right of and adjacent to defendant's car, passed left and against defendant's car, thus causing defendant's car to swerve to the

left and into plaintiff's car, as alleged; that he, defendant, started chasing the car which struck his car, and kept up such chase for some distance when he, defendant, was overtaken by another driver, who insisted that defendant return to the scene of the accident, which defendant did not do.

Plaintiff testified that he obtained the number of defendant's car from the police record, and wrote to defendant twice before defendant called upon him. The amount of the damage to plaintiff's car, as shown by the repair bill, was $324.45, in addition to which plaintiff was compelled by the Commissioners of Lincoln Park to pay $21.90 for the concrete lamp post, making a total of $346.35, the amount of the judgment. The amount of the damage is not disputed, nor is it claimed that the bill is excessive.

The court was not in error in admitting the bill for repairs in evidence. Cloyes v. Plantje, 231 Ill. App. 183. The trial court heard the evidence, and we see nothing in the record which would justify a reversal. The judgment is affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

lair and into plaintiff's car, is alleged, that he, defendant, started chasing the car which attack his dog, and kept up such chase for some distance when he, defendant, was overtaken by another driver, who insisted that defendant return to the scene of the attack, which defendant did not do.

Plaintiff testified that he obtained the number of defendant's car from the police record, and sued to defendant twice before defendant called upon him. The amount of the damage to plaintiff's car, as shown by the repair bill, was $224.40, in addition to which plaintiff was compelled by the Commissioners of Lincoln Park to pay $21.80 for the concrete lamp post, making a total of $246.20, the amount of the judgment. The amount of the damage is not disputed, but it is claimed that the bill is excessive.

The court was not in error in admitting the bill for repairs in evidence. Glaum v. Hamlin, 221 Ill. App. 182. The trial court heard the witnesses, and we see nothing in the record which would justify a reversal. The judgment is affirmed.

AFFIRMED.

WILSON AND MCGURN, JJ., CONCUR.

38365

HARRISBURG COAL MINING CO., (a corp.),
Complainant below,
v.
ENDER COAL & COKE CO., (a corp.),
Defendants below.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v.
JOHN H. EVANS,
Appellant.

60 A

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

272 I.A. 608

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with case No. 38364 for hearing in this court. The facts and the law in that case are controlling in this case, and for the reasons stated in that opinion, the order of the Superior Court of June 28, 1932, in Harrisburg Coal Mining Company v. Ender Coal & Coke Company, holding respondents guilty of contempt, is affirmed.

AFFIRMED.

WILSON, J. AND HEBEL, J. CONCUR.

61

36274

HENRY F. JOHNSON and JOHN J. JOHNSON, doing business as JOHNSON BROTHERS COAL COMPANY, Appellees, v. CHARLES ALEKNO and OLGA ALEKNO, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 608[3]

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago upon the verdict of a jury in a suit by plaintiff, against defendants, for moneys alleged to be due plaintiff from defendants. The suit was first brought against defendant, Charles Alekno. Subsequently, Olga Alekno, wife of Charles, was made a party defendant, and it is from a judgment against the two that this appeal is taken.

The charge in the statement of claim is that the defendants were and are indebted to plaintiff for coal delivered to various apartment buildings in the city of Chicago.

Defendant, Charles Alekno, in his affidavit of merits filed, charges that the coal alleged to have been delivered was not of the quality contracted for, and that plaintiff agreed to replace such coal, which they did not do. Defendant, Olga Alekno, denies all liability. She denies that she purchased any of the coal involved in the suit, or that she agreed to pay for it. The record shows that the account in plaintiff's books is against both defendants and there is some evidence to the effect that when the charge for the coal alleged to have been delivered was first entered in plaintiff's books, it was entered against defendant, Charles Alekno, alone, and that subsequently the name of Olga Alekno was added.

The bookkeeper and general office man of plaintiff testified that he first met Charles Alekno in plaintiff's office, but that he,

Opinion filed Oct. 15, 1933

Mr. Justice Jones delivered the opinion of the court.

This is an appeal from a judgment of the municipal court of Chicago upon the verdict of a jury in a suit by plaintiff, against defendants, for money alleged to be due plaintiff from defendants. The suit was first brought against defendant, Charles Clahn. Subsequently, Clyde Clahn, wife of Charles, was made a party defendant, and it is from a judgment against the two that this appeal is taken.

The charge in the statement of claim is that the defendants were and are partners in business in Chicago, and that they owned the apartment buildings in the city of Chicago.

Defendant, Charles Clahn, in his affidavit of merits filed, denies that the suit alleged to have been delivered was one of the quality contracted for, and that plaintiff agreed to replace such suit, which they did not do. Defendant, Clyde Clahn, denies all liability. She denies that she constituted any of the suit involved in the suit, or that she agreed to pay for it. The record shows that the amount in plaintiff's books is without both defendants and there is some evidence to the effect that when the charge for the suit alleged to have been delivered was first entered in plaintiff's books, it was entered against defendant, Charles Clahn, alone, and that subsequently the name of Clyde Clahn was added.

The bookkeeper and general office man of plaintiff testified that he first set Charles Clahn in plaintiff's office, but that he,

the witness, had never met Mrs. Alekno; that the coal was delivered to various places, to-wit: 5317 Maryland Avenue, 724 and 728 East 50th Place, 7000 South May Street and 5721 and 5723 Prairie Avenue in the city of Chicago; that he the witness, looked up the title to the properties and found the title to 5317 Maryland Avenue to be in the name of Alekno and wife; that Alekno asked him to deliver the coal at the various properties and that he received no request or order from anyone else to make such deliveries. This witness also testified that the building at 724 East 50th Place to which some of the coal was delivered, was owned by one Joseph Augustinovic. One Henry F. Johnson, a witness produced by plaintiff testified that Alekno told the witness that he, Alekno, was going to handle the Augustinovic property, and that he, Alekno, would pay the bills, and that this witness then proceeded to transfer the account to Alekno and wife. This witness also testified that he called the defendant, Olga Alekno, on the telephone and told her that her husband should come over with money, and that her answer was "We need coal, Charles will be over." This latter statement is all that the record discloses from which the effort is made to make Olga Alekno liable.

Olga Alekno testified that she owned the building at 7000 South May Street, to which some of the coal in question was delivered. She further testified that she had nothing whatever to do with any of the buildings which her husband managed for others. The suit is for coal alleged to have been delivered to four buildings, with three of which defendant Olga Alekno, as shown by the record, had nothing to do It is not in evidence that she at any time made any of these purchases or that she agreed to become liable therefor.

The judgment is joint and must be reversed, and remanded for a new trial. REVERSED AND REMANDED.

WILSON, P.J. AND HEBEL, J. CONCUR.

36283

AVEDIS BOGOSIAN, Administrator of the Estate of Hasadoor Manoogian, deceased,

Appellant,

v.

AMERICAN EXPRESS COMPANY, a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

272 I.A. 608

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against plaintiff for costs in a suit by plaintiff, Avedis Bogosian, Administrator of the estate of Hasadoor Manoogian, deceased, defendant, brought to recover on a check or draft issued by defendants on July 10th, 1914, drawn on Hagop M. Janjigian and Son, at Harpoot, Turkey, and payable to Hasadoor Manoogian. A certified copy of letters of administration issued by the Probate Court of Cook County to Avedis Bogosian, as Administrator of the estate of Hasadoor Manoogian, the payee of such check, was admitted in evidence, and indicates that Manoogian died on or about April 18th, 1915.

It is alleged in the statement of claim and the record shows that on the date of the check sued on, July 10th, 1914, Hasadoor Manoogian purchased a draft from the American Express Co., for $1,500.00, which is in words and figures, as follows:

"AMERICAN EXPRESS COMPANY
CHEQUE NO. 642682
Chicago, Ill. July Tenth, 1914.

On presentation of this Cheque, pay from our credit balance to the order of Hasadoor Manoogian Ltq 335 - Three Hundred Thirty Five Turkish Pounds.

To Hagop M. Janjigian and Son at Harpoot, Turkey.

American Express Company,
Jas. F. Fargo,
Treasurer.
Countersigned D. M. Biggar."

Also that on the same day there was issued by defendant to Manoogian what was termed a "remitter's receipt", as follows:

"REMITTER'S RECEIPT

Caution

Send check by registered mail.

This check is sold with the understanding that it will be paid in accordance with the laws of the country on which drawn which usually do not require identification of payees.

We have this date issued our check No. 643682.

Amount of foreign money Ltq 335
448 $1500.80
payable to
By Hegop M. Janjigian and Son
Harpoot, Turkey.

Sold to
Dated July 10, 1914.

American Express Company,
D. M. Biggar, Agent."

From the record it appears that the draft in question was purchased and issued as alleged, and that it was sent to Manoogian in Harpoot, Turkey.

One Israel Bogosian testified that Manoogian received the check or draft in question, and that thereafter he, the witness, went with Manoogian, the payee, to the office of Janjigian, the drawee, the latter being then a banker in Harpoot, Turkey, and Janjigian told Manoogian and the witness that he could not cash the draft because he had not, as yet, received a remittance from the United States. This witness further testified that shortly thereafter a massacre of many people occurred in Harpoot, Turkey, and that Janjigian, the drawee, and Manoogian, the payee, were both killed, and that Jangigian's bank never opened again.

Avedis Bogosian, the administrator and plaintiff, testified that in June, 1930, he received the check or draft in question, together with a power of attorney from the sons of Manoogian, who reside in Turkey; that he delivered a photostatic copy of the power

also that on the river by those who learned of attempts to dispose
what was termed a "residuary receipt", as follows:

"Residuary receipt

Sealed

Some stamps by registered mail.

This stamp is only with the understanding that it
will be paid somewhere with the loss of the sending
as under first class mail usually is not insure identification
of sender.

We have this date issued our check for, sealed.

Amount of check upon the 4th
day [illegible]
Receipt is
by Hugo S. Jenkins and the
Bryant, Texas.

Sold to
Date July 20, 1924.
Andrew Stevens Company,
S. A. Elmore, agent."

From the record it appears that the draft in question was
presented and issued to Jenkins, and that it was paid to Jenkins
in Bryant, Texas.

The lower Dominion Realtied Inc. Jenkins received the
check as draft in question, and that thereafter he, the witness,
went with Jenkins, the payee, to the office of Jenkins, the
drawee, the latter being then a house in Bryant, Texas, and
Jenkins told witness and the witness that he would let each the
draft because he had not, as yet, received a settlement from the
Dominion Realtied. This witness further testified that shortly thereafter
a messenger of some people connected in Bryant, Texas, and that
Jenkins, the drawee, and Jenkins, the payee, were both killed, and
that Jenkins's home never opened again.

Jenkins testified, the administrator and quantity, testified
that in June, 1923, he received the check or draft in question, to-
gether with a copy of attorney from the owner of Jenkins, who
resides in Dryden; that he delivered a photostatic copy of the power

of attorney and letters of administration to the officers of the defendant, which facts are admitted by defendant, and that thereafter he received the following communication from defendant:

"September 8, 1930.

Messrs. McDonald & Richmond,
Attorneys at Law,
110 S. Dearborn St.,
Chicago, Illinois:

Cheque No. 642682 - Turkish pounds 335, July 10, 1914.

Referring to your letter of August 27, in regard to cheque No. 642682 dated July 10, 1914, for Turkish Pounds 335.

We do not consider ourselves in any way legally obligated upon this cheque inasmuch as the instrument was apparently never presented for payment, and sinhe such a long period of time has elapsed. However, if you will submit to us an affidavit or affidavits setting forth the following matters, which should also contain a statement as to the sources of the affiant's knowledge and surrender the original cheque to us duly endorsed, we should be willing to pay the present value of Turkish Pounds 335, which is about $157.00.

1. That Hasadoor Manoogian died domiciled in Illinois.

2. That at the time of his death he left no will.

3. That since his death there have been no probate or administration proceedings.

4. That there are now no debts owed by the former Hasadoor Manoogian.

5. That Margos, Ouroune and Gerabed Manoukian, also known as Margos, Ouroune and Gerabed Manoogian, at present residing in the city of Marseilles, France, were the only children of Hasadoor Manoogian surviving him at his death, and that at the time of his death the deceased left him surviving no issue of any deceased child.

This offer is made without prejudice of the rights of the American Express Company in the matter.

Yours very truly,

(Signed) Geo. Weston,

Vice President and Treasurer."

Various defenses were set up in the affidavit of merits, among them being one to the effect that the claim of plaintiff is and was barred by the Statute of Limitations. Plaintiff contends that inasmuch as defendant had no credit balance with the drawee of

the check, that the transaction was fraudulent, and that, therefore, defendant cannot use the Statute of Limitations as a defense, and further that the letter of September 8th, 1930, contains a new promise which removes the bar of the Statute of Limitations.

As we view the record, there is but one point raised by it which it is necessary for this court to consider, and that is, whether or not the letter of defendant to plaintiff of September 8, 1930, is such a new promise to pay as will remove the bar of the Statute of Limitations. While appellant cites several cases to sustain his position that the letter of defendant contains a promise to pay which removes the bar of the Statute of Limitations, in his argument he seems to rely upon two cases, viz: Walker v. Freeman, 209 Ill. 17, and Abdill v. Abdill, 292 Ill. 221. In the former case, the maker of the note wrote letters in which he acknowledged the debt, agreed to make a new note, asked for more time, and made not one but a number of unequivocal promises to pay. He stated that he owed the money, and told when he could and would pay it. In Abdill v. Abdill, supra., the court said:

> "No formal set of words is necessary to constitute an acknowledgment of a debt and a promise to pay it. An absolute acknowledgment of the continuance of the debt and a promise to pay it is sufficient, and any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it will take the case out of the statute. (Mellick v. DeBeelhorst, Dreese, 221; Kesner v. Crull, 19 Ill. 189; Horner v. Starkey, 27 id. 13; Bennett v. Horner & Hynes, 30 id. 429; Wooters v. King, 84 id. 343; (O'Harra v. Murphy, 196 id. 599.)"

In the instant case, there is no such promise. On the contrary, the defendant makes a categorical denial of liability in the following words: "We do not consider ourselves in any way legally obligated upon this cheque, inasmuch as the instrument was apparently never presented for payment, and since such a long period of time has elapsed." The letter goes on to say that under certain conditions,

the shape, that is essentially not fundamental, but that, therefore, defendant cannot use the statute of limitations as a defense, and further that the letter of September 8th, 1880, constitutes a new promise which removes the bar of the statute of limitations.

As we view the record, there is but one point raised by it which is necessary for this court to consider, and that is, whether or not the letter of defendant in plaintiff of September 8, 1880, is such a new promise to pay as will remove the bar of the statute of limitations. While numerous cases have been cited by the parties that the issue of technical sufficiency of a promise to pay which removes the bar of the statute of limitations, in this court we need go back to only two cases, viz: Miller v. Kennedy, 200 Ill. 17, and Smith v. Smith, 200 Ill. 371. In the former case, the owner of the note wrote letters in which he acknowledged the debt, agreed to make a new note, asked for more time, and made not one but a number of unequivocal promises to pay. He stated that he owed the money, and told when he would and would pay it. In Smith v. Smith, supra, the court said:

> "An express act or words is necessary to constitute an acknowledgment of a debt and a promise to pay it. An express acknowledgment of the obligation of the note and a promise to pay it is sufficient, and any language or the debtor to the creditor clearly admitting the debt and showing an intention to pay it will take the note out of the statute. (Miller v. Kennedy, supra, 17; Kenney v. Smith, 19 Ill. App. 20 Ill. App. 1; Barnes v. Ellis, 24 Ill. App. 1; Bartner v. Bartner, 134 Ill. 100.)"

In the instant case, there is no such promise. On the contrary, the defendant makes a conditional denial of liability in the following words: "I do not consider ourselves in any way legally obligated upon this charge, inasmuch as the instrument was originally never presented for payment, and since such a long period of time has elapsed." The letter does go on to say that under certain conditions,

defendant will pay $157.00. There is nothing in the record to show whether or not defendant remitted to the payee of the draft the amount thereof, so that there is nothing to sustain plaintiff's point that the defendant was guilty of fraud in failing to make such remittance. Nothing has been presented to this court which would justify a reversal of the judgment appealed from. Therefore, it is affirmed.

AFFIRMED.

WILSON, J. AND NEBEL, J. CONCUR.

36314

63 4

GERTRUDE RUTH SESSLER, executrix of the estate of HUGO HERMAN SESSLER, deceased,

Appellant,

v.

NIELSEN BROTHERS CARTAGE COMPANY, a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

272 I.A. 609

Opinion filed Oct. 25, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County against plaintiff for costs in an action by plaintiff, executrix of the estate of Hugo Herman Sessler, deceased, against defendant, in which it is claimed that Hugo Herman Sessler, husband of plaintiff, came to his death through the negligence of defendant. The cause was submitted to a jury, which returned a verdict of not guilty, upon which verdict the judgment appealed from was entered. The hearing was had upon a charge of general negligence and a plea of not guilty. Plaintiff complains that the trial court was in error in giving to the jury numerous instructions, each concluding with a direction to the jury to find defendant not guilty, and that the verdict was against the manifest weight of the evidence.

From the evidence not disputed, it appears that on November 6th, 1930, at about noon time, decedent was standing with a number of persons at the northwest corner of Dearborn Street and Wacker Drive in the city of Chicago, watching and waiting for the passage of a parade of a number of automobile trucks, which parade came from the north on Dearborn Street and turned west on Wacker Drive, and that as the last of the trucks turned the corner, decedent was struck by this truck and thereby injured so that he died.

Leroy Meurlin testified that at the time of the accident,

Opinion filed Oct. 25, 1933

This is an appeal from a judgment of the circuit Court of Cook County against plaintiff for costs in an action by plaintiff, executrix of the estate of Mary Jerome deceased, against defendant, in which it is claimed that Mge Jerome died, without of plaintiff, owing to his death through the negligence of defendant. The cause was submitted to a jury, which returned a verdict of not guilty, upon which verdict the judgment appealed from was entered. The evidence was but upon a charge of general negligence and a plea of not guilty. Plaintiff contends that the trial court was in error in giving to the jury numerous instructions, each concluding with a direction to the jury to find defendant not guilty, and that the verdict was against the manifest weight of the evidence.

From the evidence not disputed, it appears that on December 22, 1927, at about noon time, defendant was standing with a number of persons at the northwest corner of Jackson Street and Wacker Drive in the city of Chicago, waiting and waiting for the passing of a parade of a number of automobile trucks, which parade came from the north on Dearborn Street and turned west on Wacker Drive, and that as the last of the trucks turned the corner, deceased approached by this truck and thereby injured so that he died.

Lucy Kowalin testified that at the time of the accident,

he was walking north on the east side of Dearborn Street crossing over Wacker Drive, and that he saw five or six people standing at the northwest corner of the two streets, and that as he looked he saw that the truck in question "made impact" with a man who fell down, and that the rear wheels of the truck passed over this man's legs; that as the man fell, he lay there with his head and shoulders on the curb andthat the rest of his body was in the street, so that the rear wheels went over him; that the driver "apparently did not know that he had struck the man and drove on." This witness testified further that he could not tell what portion of the truck struck the man, and that when he first saw decedent, he, decedent, was spinning around. This witness further testified that as the truck left the Dearborn Street Bridge coming into Wacker Drive, it was running from about 18 to 22 miles per hour. This witness also testified that this truck, with the others, was led by motorcycle police, and had the right of way around the corner of Dearborn Street and Wacker Drive, and that no one was crossing Wacker Drive when the truck made the turn. It seems not to be disputed by the parties that the truck which it is charged struck and injured decedent had been delayed and was hurrying to catch the others.

Joe Daley testified on behalf of plaintiff that he saw the accident in question; that he was walking north on the west side of Dearborn Street and stopped at the southwest corner of Dearborn Street and Wacker Drive and saw the procession of trucks going by; that the curb at the northwest corner is low and on a curved line, and that he saw a man standing on or near the edge of the curb when the trailer on the back of the truck whipped around the corner and that after that he saw the man lying in the street. This witness identified the man whom he saw standing at the curb just before the accident as the man who was lying on the ground after the truck had passed and that

He was walking south on the west side of Dearborn Street crossing Madison Street, and that he was five or six steps standing at the southwest corner of the two streets, and that as he looked he saw this the truck in question "make lunge" with a man who fell down, and that the rear wheels of the truck passed over this man's legs; that as the man fell, he let there with his head and shoulders on the curb and that the rest of his body was in the street, so that the rear wheels went over him; that the driver apparently did not know that he had struck the man and never did." This witness testified further that he would not tell what position of the truck struck the man, and that when he first saw Doughnut, he, Doughnut, was spinning around. This witness further testified that as the truck left the Dearborn Street bridge moving like rather fast, it was running from about 15 to 20 miles per hour. This witness also testified that this truck, with the driver, was led by motorcycle police, and had the right of way around the corner of Dearborn Street and Harbor Drive, and that he was crossing Harbor Drive when the truck made the turn. It seems not to be disputed by the parties that the truck which it is charged struck and injured decedent had been delayed and was hurrying to make the stream.

The Judge instructed on behalf of plaintiff that he saw the accident in question; that he was walking south on the west side of Dearborn Street and stopped at the southwest corner of Dearborn Street and Harbor Drive and saw the prosecution of trucks going by; that the truck of the northwest corner is low and on a curved line, and that he saw a man standing on or near the edge of the curb when the trailer on the rear of the truck swinged around the corner and that after that he saw the man lying in the street. This witness identified the man whom he saw standing at the curb just before the accident as the man who was lying on the ground after the truck had passed and that

such person was the man who was struck.

Harry E. Neuhaus, a police officer, testified that he was in charge and in direction of traffic at Dearborn Street and Wacker Drive at the time of the accident in question; that after the last machine of the parade had passed, he saw a man lying there; that in his opinion this truck was going from 18 to 20 miles per hour. This is approximately the rate of speed of the truck given by other witnesses.

Other than a witness who testified as to the mechanical construction of the truck in question, defendant's only witness was the driver of the truck, who testified that he did not look to the right at the corner as he turned, but that as he drove around the corner, he looked straight ahead.

Upon the evidence adduced, it was the duty of the trial court to have carefully instructed the jury. The court gave twenty two instructions on behalf of the defendant, ten of which directed the jury under a certain state of presumed facts, to find for the defendant. Upon the question of the burden of proof cast upon the plaintiff, many instructions were given, the giving of which tended to magnify the duty of plaintiff in this regard. As to the question of the care which should have been exercised by decedent in order that he might have been free from negligence which might have contributed to his injury, a number of instructions were given, among them the following:

> "The Court instructs the jury that before the plaintiff can recover against the defendant in this case, she must prove by a preponderance or greater weight of the evidence each and all of the following propositions:
>
> 1. That the defendant was guilty of some negligent act or omission charged in some count of the declaration.
>
> 2. That immediately before and at the time of the accident the deceased was in the exercise of due care for his own safety, under the circumstances of this case,

such person was the man who was driving.

Harry S. Brown, a police officer, testified that he was in charge and in direction of traffic at Fourteenth Street and Vermont at the time of the accident in question; that after the last member of the parade had passed, he saw a man lying there; that he has claims this truck was going from 12 to 20 miles per hour. This is approximately the rate of speed of the truck given by other witnesses.

Other than a witness who testified as to the mechanical construction of the truck in question, defendant's only witness was the driver of the truck, who testified that he did not look to the right as he passed on to Vermont, but that as he drove around the corner, he looked straight ahead.

Upon the evidence adduced, it was the duty of the trial court to have correctly instructed the jury. The court gave twenty two instructions on behalf of the defendant, two of which directed the jury under a certain state of presumed facts, to find for the defendant. Upon the question of the burden of proof rest upon the plaintiff, many instructions were given, the giving of which tended to negatify the duty of plaintiff in this regard. As to the question of the care which should have been exercised by pedestrians in order that he might have been free from negligence which might have contributed to his injury, a number of instructions were given, among them the following:

"The Court instructs the jury that before the plaintiff can recover against the defendant in this case, she must prove by a preponderance of greater weight of the evidence each and all of the following propositions:

1. That the defendant was guilty of negligence in the manner in which he was driving his car at the time in question.

2. That immediately before and at the time of the accident she exercised care in the exercise of her own safety, under the circumstances of this case.

and that he did not, by any failure to exercise care for his own safety, cause or proximately contribute to cause the accident.

3. That the negligence of the defendant, if any, was the proximate cause of the accident.

If the plaintiff failed to prove each and all of the foregoing propositions by a preponderance of greater weight of the evidence, or if the evidence bearing on any or all of said propositions is evenly balanced, or if the evidence bearing on either or all of said propositions preponderates in favor of the defendant, then the plaintiff cannot recover in this case and the jury should find the issues for the defendant."

In Daubach v. Drake Hotel Co., 343 Ill. App. 298, the trial court gave this same instruction, and about it, this court said, page 306:

"In considering the instruction in question, since it is a peremptory instruction, the well-established rule must be borne in mind that the instruction must contain all of the elements necessary to warrant a verdict. O'Day v. Grabb, 269 Ill. 133, 133; Illinois Iron & Metal Co., v. Weber, 196 Ill. 526,531.

The precise part of the instruction that is in controversy is paragraph 2. Counsel for the plaintiff has made a minute analysis of the paragraph. He contends that the paragraph reasonably is susceptible of several materially different interpretations, any one of which would render the instruction erroneous and seriously prejudicial to the plaintiff. Counsel for the defendant maintain that the paragraph should not be construed hypercritically and artificially; that the proper test to be used in ascertaining its meaning is, 'What would an ordinary person understand' it to mean? We think that that test is the correct one and it is the one we shall adopt in construing the paragraph.

In the view we take of the paragraph, we do not think it is necessary to state and discuss separately all of the different readings of the paragraph which counsel for the plaintiff has pointed out. It is sufficient to say that since the word 'care' in the clause 'by any failure to exercise care for her own safety,' obviously should have been qualified by the word 'ordinary', it follows that the paragraph is susceptible of at least two different interpretations. Whether these interpretations are both reasonable is the question to be determined. Or to express the idea in another way, is the error in the paragraph a slight or a substantial one? Since the bill of exceptions does not contain the evidence the doctrine of 'harmless error' is inapplicable. If the error in the paragraph is a substantial one, we must assume that it was prejudicial. * * * Error will compel a reversal unless the record affirmatively shows that the error was not prejudicial. Crane Co. v. Hogan, 238 Ill. 338, 340; Fold v. Madison Building Co., 216 Ill. App.

and thus be did not, by any failure to exercise care in his own safety, cause or contributed contributed to cause the accident.

2. That the negligence of the defendant, if any, was the proximate cause of the accident.

If the plaintiff fails to prove each and all of the foregoing propositions by a preponderance of greater weight of the evidence, or if the evidence leaving in doubt or all of any proposition in dispute, or if the evidence tending to either or all of the foregoing propositions in favor of the defendant, then the plaintiff cannot recover in this case and the jury should find for the defendant."

In Dunnett v. Great Coal Co., 77 Ill. App. 598, the trial court gave this same instruction, and about it, this court said:

"In considering the instruction in question, since it is a peremptory instruction, the well-established rule must be borne in mind that the instruction must embody all of the elements necessary to support a verdict. Chicago v. Kemper, 201 Ill. 148, 157; Illinois Cent. R. Co. v. Cobb, 154 Ill. 333, 337.

The precise test of the instruction that is in controversy is whether or not the plaintiff has made a case by evidence of his contention. In considering this the contention properly is admissible of proof, and if we should consider the instruction, any one of which would tender the instruction erroneous and misleading to the plaintiff. Counsel for the defendant contends that the evidence should not be considered 'cumulatively' but individually, that the proper test is to read in succession the evidence in, 'that would be sufficient if taken individually' is to mean to think that that that is the correct one and if it is not we shall enjoy in sustaining the instruction.

In the view we take of the instruction, we do not think it is necessary to which the numerous propositions all of the different problems of the instruction which contained for the plaintiff are raised and. It is sufficient to say that since the word 'clear' in the phrase 'by any failure to exercise care for his own safety,' obviously should have been qualified by the word 'relative', it follows that the instruction is susceptible of at least two different interpretations. Whether these interpretations are both reasonable in the matter to be determined, or to express the idea in another way, in the view in the phrase a right or a substantial doubt. Since the gist of instruction does not contain the evidence the instruction 'tendency error' is inapplicable. If the error in the instruction is a substantial one, we must assume that it was prejudicial. . . . Since will depend a material upon the proper distribution upon the jury, the error was not prejudicial. Cook Co. v. Chicago, 111 Ill. 62, 70; Dole v. Chicago Railway Co., 69 Ill. App.

39,51; Gasey v. Prudential Ins. Co., of America, 167 Ill. App. 581, 586; Melony v. Library Bureau, 148 Ill. App. 437, 442. The rule is not that the court must see that the error worked injury to the party complaining, but that the court will not affirm where error has intervened unless it shall appear from the whole record that such error reasonably could not have affected the result. People v. Michael, 280 Ill. 11, 15, 16; Kirby v. People, 137 Ill. 436, 439.

We are of the opinion that the error in question was of a substantial character. The paragraph in controversy contains two clauses relating to the care required of the plaintiff. These two clauses are inconsistent, one defining the degree of care to be ordinary care, and the other leaving the degree of care undefined. ***

According to the well settled rule, since the instruction is a peremptory one, the error in the instruction cannot be cured by any other instruction in the series of instructions. Cantrell v. Harding, 249 Ill. 354, 358; Cromer v. Borders Coal Co. 246 Ill. 451, 457; Illinois Iron & Metal Co. v. Feber, supra. (p.531)."

The giving of many instructions of the character of those given on behalf of defendant in this case, tends to either confuse or mislead the jury. The defendant gained nothing by this method and manner of instructing the jury. Because of the instructions given on behalf of defendant, the plaintiff did not have a fair trial. Therefore, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

WILSON AND HEBEL, JJ. CONCUR.

[illegible] v. [illegible], [illegible] Ill. App. [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible]. The rule is not that the court must say that the error worked injury to the party complaining, but that the court will not disturb where error has intervened unless it shall appear from the whole record that such error reasonably could not have affected the result. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible].

We are of the opinion that the error in question was of a substantial character. The confusion is aggravated because [illegible] relating to the same [illegible] of the plaintiff. These two [illegible], one defining the degree of care to be ordinary care, and the other leaving the degree of care undefined. [illegible]

According to the well settled rule, since the instruction is a peremptory one, the error in the instruction cannot be cured by any other instruction in the series of instructions. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; Illinois [illegible] v. [illegible]."

The giving of many instructions at the instance of those given on behalf of defendant in this case, might in itself mislead or confuse the jury. The defendant gained nothing by this method and manner of instructing the jury. Because of the instructions given on behalf of defendant, the plaintiff did not have a fair trial. Therefore, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED.

KILEY and [illegible], JJ., concur.

36153

JAMES S. MIX,

Appellant,

v.

CHICAGO GREAT WESTERN RAILROAD COMPANY, a Corporation,

Appellee.

64 A

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

272 I.A. 609

Opinion filed Oct. 25, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages under the Federal Employers Liability Act of 1908, for injuries sustained by the plaintiff on the 25th day of March, 1929, while employed by the defendant as a conductor in charge of a freight train and caboose. At the conclusion of the plaintiff's case the court directed a verdict for the defendant and entered judgment upon the verdict of the jury, from which the plaintiff appeals.

On February 14, 1931, the plaintiff filed his declaration consisting of four counts, and on December 24, 1931, plaintiff filed three additional counts to the declaration. On April 5, 1932, the plaintiff filed an amended additional count two. At the time of the trial the plaintiff dismissed the four counts of his original declaration, and the case proceeded to trial upon the first additional count one, and the amended additional count two and additional count three.

Additional count one is a common law count, alleging that said caboose was not in a reasonably safe or suitable condition for use by the plaintiff because of a certain nail or nails in the door, or the side of the caboose adjacent to the door; that on the 24th day of March, 1929, plaintiff notified and informed his superior officer, Edward Stickler, Yardmaster of said defendant, that a certain nail or nails were protruding from the side of said caboose; that Stickler promised to have said caboose repaired; that said caboose was not repaired, and that on the 25th day of March, 1929, while plaintiff

Opinion filed Oct. 25, 1933

Mr. Justice Stone delivered the opinion of the court.

This is an action to recover damages under the federal Employers Liability Act of 1908, for injuries sustained by the plaintiff on the 28th day of March, 1929, while employed by the defendant as a conductor in charge of a freight train and caboose. At the conclusion of the plaintiff's case the court directed a verdict for the defendant and entered judgment upon the verdict of the jury, from which the plaintiff appeals.

On February 14, 1921, the plaintiff filed his declaration containing four counts, and on December 14, 1921, plaintiff filed three additional counts to the declaration. On April 3, 1922, the plaintiff filed an amended additional count two. At the time of the trial the plaintiff dismissed the four counts of his original declaration, and the case proceeded to trial upon the three additional count one, the amended additional count two and additional count three.

Additional count one is a common law count, alleging that acid cabooses are not in a reasonably safe or suitable condition for use by the plaintiff because of a certain acid or acids in the door, or the side of the caboose adjacent to the door; that on the 28th day of March, 1929, plaintiff received and inhaled its noxious effluvia, thereby injured, Furthermore it said defendant, that a certain acid or acids were protruding from the side of said caboose; that relying upon defendant to have said cabooses repaired; that said cabooses was not repaired, and that on the 28th day of March, 1929, while plaintiff

was in the act of alighting from the caboose, which was in motion, and approaching Forest Park, Illinois, his clothing was caught on the nail projecting from the door, whereby he lost his balance and was thrown to the ground and injured.

Amended additional count two was filed on April 25, 1932, as a common count alleging in a slightly different form that the caboose was unsafe and unsuitable to use, because of the dangerous position, location or proximity to the plaintiff while alighting, of said nail or nails so projecting from the door or the side of said caboose.

Additional count three is a common law count alleging that there was a nail driven into the outside of the door of the caboose which projected outward two inches from the side of the door, and thereby the caboose was not in a reasonably safe and suitable condition to use.

It is further alleged that Edward Stickler, promised the plaintiff that the defendant would remove said nail from the door; that the plaintiff relied on said promise, and that on the 25th day of March, 1929, while plaintiff was alighting at Forest Park, Illinois, the nail projecting from said door caught plaintiff's clothing and he was thereby caused to fall to the ground and to become injured.

The defendant pleaded the general issue and the statute of limitations. To defendant's plea of the statute of limitations the court sustained plaintiff's demurrer, and thereupon the defendant elected to stand by his plea of the statute of limitations.

The facts are, substantially, that prior to March 25, 1929, the plaintiff was employed by the defendant for 28 years as a switchman and conductor; that for a period of two years prior to March 25, 1929, he was employed on the train known as the Bellwood Switch Extra. The crew of the freight train of which the plaintiff was conductor, consisted of William Forbes, the head man; James Anson, the rear man; Jerry Sullivan, the engineer, and Bert Justus the fireman. The

was in the act of alighting from the caboose, which was in motion, and approaching Forest Park, Illinois, his clothing was caught on the rail projecting from the door, whereby he lost his balance and was thrown to the ground and injured.

Amended additional count two was filed on April 30, 1932, as a common count alleging in a slightly different form that the caboose was unsafe and unsuitable for use, because of the defective position. Section 27 provides in the pertinent part: "Grabs, handholds of said rail or rails so projecting from the door or the side of said caboose.

Additional count three is a common law count alleging that there was a rail driven into the outside of the door of the caboose which projected various inches from the side of the door, and thereby the caboose was not in a reasonably safe and suitable condition to use.

It is further alleged that defendant, knowing the plaintiff that the defendant would remove this rail from the door; that the plaintiff relied on said promise, and that on the 19th day of March, 1932, while plaintiff was alighting at Forest Park, Illinois, the rail projecting from said door caught plaintiff's clothing and he was thereby caused to fall to the ground and to become injured.

The defendant pleaded the general issue and the statute of limitations. To defendant's plea of the statute of limitations the same replied plaintiff's insanity, and therefore the defendant elected to stand by his plea of the statute of limitations.

The facts are, substantially, that prior to March 19, 1932, the plaintiff was employed by the defendant for 20 years as a switchman and was foreman; that for a period of the years prior to March 19, 1932, he was employed on the train known as the Delaware Lackawanna. The crew of the freight train of which the plaintiff was conductor, consisted of William Grimes, the head man; James Lynch, the rear man; Jerry Sullivan, the engineer, and Jerry Jones the fireman. The

Bellwood crew had assigned to it for its use caboose No. 326. It was a wooden box car remodeled as a caboose, about 30 feet long, with side doors on each side, and steps under each door, and was fitted with grab-irons on the side of the caboose door. The caboose was divided by a partition into two compartments, one of which was used by the plaintiff as the conductor to make out his reports. For that purpose there was a desk in the compartment, also a bench and seats for the use of the crew, and a coal box and stove. The other compartment was used to keep supplies, oils, etc.

On March 23, 1929, when plaintiff entered the caboose he found that the stove and desk had been upset and that the rafters supporting the roof were unfastened and loose. The plaintiff worked that day and used the caboose in the condition in which he found it from 7:43 A. M. to 7 P.M.

After the plaintiff had finished his work Saturday evening, March 23, 1929, he left a note, with his waybills, for the yardmaster, Fitt, to have the caboose put on the repair track for repairs. On March 24, 1929, plaintiff was in the vicinity of the office of Yardmaster A. L. Stickler, and noting that the caboose had not been repaired, he informed the yardmaster that he, the plaintiff, left a note the night before with his waybills for Yardmaster Fitt, to have the caboose put on the repair track and repaired. The caboose was then switched from track 13 to track 15. When the caboose was shoved in on track 15 and had stopped on this track, the plaintiff for the first time noticed the large nail projecting about 2½ inches from the north door of the caboose, about 3 inches above the floor and 3 or 4 inches from the edge of the door. The plaintiff immediately reported this fact to Stickler. On Monday morning, March 25, 1929, he reported to work at 9:45. He saw the caboose attached to the end of the train standing on track 13 in the west yard. He checked the train by writing down the initial and number of each car, and

Railroad crew had assigned to it for its use caboose No. 555. It was a wooden box car remodeled as a caboose, about 30 feet long, with side doors on each side, and stage roof over, and was fitted with grab-irons on the side of the caboose door. The caboose was divided by a partition into two compartments, one of which was used by the plaintiff as the conductor in charge of his crew. For that purpose there was a desk in the compartment, also a bench and seats for the use of the crew, and a coal box and stove. The other compartment was used to keep supplies, oil, etc.

On March 23, 1920, when plaintiff entered the caboose to found that the stove had been upset and that the trainmen engaging the rear were injured and lame. The plaintiff stated that day and used the caboose in the condition in which he found it from 7:00 A. M. to 7 P.M.

After the plaintiff had finished his work Saturday evening, March 23, 1920, he left a note, with his wife, for the yardmaster, that, to have the caboose put on the repair track for repairs. On March 24, 1920, plaintiff was in the vicinity of the office of Yardmaster L. L. Frisbey, and noting that the caboose had not been repaired, he informed the yardmaster that he, the plaintiff, left a note the night before with his wife for Yardmaster Fitz, to have the caboose put on the repair track and repaired. The caboose was then switched from track 12 to track 22. When the caboose was moved in on track 12 and had stopped on this track, the plaintiff for the first time noticed the large nail projecting about 3½ inches from the north door of the caboose, about 3 inches above the floor and 2 or 4 inches from the side of the door. The plaintiff immediately reported this fact to Frisbey. On Sunday morning, March 28, 1920, he reported to work at 8:00. He was the caboose assigned to the end of the train standing on track 12 in the yard. He checked the train by writing down the initial and number of cars, and

when he reached the caboose he saw the characters "O.K." just west of the door of the caboose, which O. K. indicated that the caboose had been repaired and was fit for road service. The train of cars on the date of which the plaintiff was the conductor, pulled out of the yard and proceeded on its trip. When the plaintiff entered the caboose he found that it had apparently been repaired. Upon the arrival of the train at Forest Park, Illinois, plaintiff proceeded to alight, and opened the door and stepped down on the first step, holding to the grab iron located at the side of the door, and then to the second step, and reaching with his right hand, closed the door of the caboose behind him. While holding onto the grab iron with his left hand he had turned around until he was facing in a westerly direction, and as he neared the station at Forest Park, he balanced himself to alight, then he released his left-hand grip on the grab iron to step from the bottom step of the caboose to the platform, and while he was thus stepping off, without holding onto anything, something caught his clothing at his back or his side, and he lost his balance and fell to the station platform. He did not know what caught his clothing, but he fell while in the act of alighting from the caboose and the clothing of his body was right up against the north side of the door, and he was injured as a result of the fall.

The important question in this case is did the trial court err in holding that the plaintiff did not establish by his evidence a prima facie case. This case is largely dependent upon the evidence of the plaintiff as a witness. His evidence is not clear as to just what caused the plaintiff to fall from the caboose while he was in the act of alighting. There seems to be no dispute that the nail was projecting from or near the bottom of the place where it was located by the witnesses, but there is no evidence of a negligent act of the defendant which would make it responsible for this accident.

This court in its consideration of the evidence of the

when he reached the caboose he saw the conductor "S.K." just west of the door of the caboose, which K. K. indicated that the caboose had been required and was fit for road service. The train of cars on the date of which the plaintiff was the conductor, pulled out of the yard and proceeded on its trip. When the plaintiff entered the caboose he found that it had overheated, also leaked. Upon the arrival at the train at Forest City, Illinois, plaintiff proceeded to alight, and opened the door and stepped down on the first step, holding to the grab iron located on the side of the door, and then to the second step, and reaching with his right hand, closed the door of the caboose behind him. While holding onto the grab iron with his left hand he had turned around until he was facing in a westerly direction, and as he neared the station at Forest City, he released himself to alight, then he released his left-hand grip on the grab iron to step from the bottom step of the caboose to the platform, and while he was thus stepping off, without doing any supplying, something caught his clothing at his back or his side, and he lost his balance and fell to the station platform. He did not have had caught his clothing, but he fell while in the act of alighting from the caboose and the clothing of his body was right up against the north side of the door, and he was injured as a result of the fall.

The important question in this case is did the trial court err in holding that the plaintiff did not establish by his evidence a prima facie case. This case is largely dependent upon the evidence of the plaintiff as a witness. His evidence is not clear as to just what caused the plaintiff to fall from the caboose while he was in the act of alighting. There seems to be no dispute that the rail was projecting from or near the bottom of the place where it was intended by the railroad, but there is no evidence of a negligent act of the defendant which would make it responsible for this condition.

This court in its consideration of the evidence of the

plaintiff upon the motion of the defendant to instruct the jury, will be guided by the law as applied in this state, which is to the effect that if there is any evidence in the record which, standing alone, fairly tends to sustain the averments of the declaration, such evidence is sufficient to support a verdict in favor of the plaintiff, even though it may be that a verdict for the plaintiff would have to be set aside, upon a motion for a new trial, because it was against the manifest weight of all the evidence. Libby, McNeill & Libby v. Cook, 232 Ill. 206. The testimony of one witness only is sufficient if it fairly tends to prove the cause of action, even if the witness is contradicted by several other witnesses of equal credibility. Libby, McNeill & Libby v. Cook, supra.

The plaintiff was the only witness to the occurrence, and he frankly admitted that in alighting from the train at Forest Park, Illinois, he did not know what caught his clothing or what caused him to fall. Assuming that defendant failed to remove the nail which projected from the door of the caboose, did the nail, located as it was, cause the accident. The plaintiff does not say so. The evidence is that while the nail projected as testified to by witnesses, there is no evidence that the nail caught the clothing of the plaintiff as he was alighting from the train. The allegation upon which plaintiff's case rests is that the caboose was not in a reasonably safe or suitable condition for use because of the nail or nails projecting from the door or side of the caboose, of which the defendant had knowledge, and that while in the act of alighting from the caboose, which was in motion, the nail caught plaintiff's clothing and caused him to fall.

In this case there is failure to establish the negligence alleged in the several counts of the declaration. The most that can be said from the evidence offered by the plaintiff is that the accident may have resulted from any one of several causes, but the burden

liability upon the motion of the defendant be instruct the jury, will be guided by the law as applied in this state, which is to the effect that if there is any evidence on the record which, standing alone, fairly tends to establish the statement of the declaration, such evidence is sufficient to support a verdict in favor of the plaintiff, even though it may be that a verdict for the defendant would have to be set aside, upon a motion for a new trial. Pennsylvania is the opinion the weightest weight of all the evidence. Idaho, Dakota & Minn. R. R. v. Cook, 2nd Ill. 494. The testimony of one witness only is sufficient if it fairly tends to prove the cause of action, even if the witness is contradicted by several other witnesses of equal credibility. Illinois, Indiana & Iowa R. R. v. Cook, supra.

The plaintiff was the only witness in the proceedings, and he fairly showed that in alighting from the train in Tremont Illinois, he did not know what caused his clothing or what caused him to fall. Assuming that defendant failed to remove the rail which projected from the face of the platform, did the rail, located as it was, cause the accident. The plaintiff does not say so. The evidence is that while the rail projected as testified to by witnesses, there is no evidence that the rail caused the catching of the plaintiff as he was alighting from the train. The allegation upon which plaintiff's case rests is that the defendant was not in a reasonably safe or suitable condition for use because of the rail in question projecting from the floor or side of the platform, of which the defendant had knowledge, and that while in the act of alighting from the cars, which was in motion, the rail caused plaintiff's clothing and caused him to fall.

In this case there is failure to establish the negligence alleged in the several counts of the declaration. The most that can be said from the evidence offered by the plaintiff is that the accident may have resulted from any one of several causes, but the burden

of proof is upon the plaintiff to prove that the accident was due to the negligence of the defendant, as alleged in the declaration. Lacking such evidence, the court did not err in directing the jury to find the defendant not guilty.

Several other questions are raised by the plaintiff, but it will not be necessary to consider them in view of our conclusion that the trial court did not err in instructing the jury to find the defendant not guilty at the close of the plaintiff's case. The judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

36208

TONY TALLARICO,

Appellee,

v.

NEWARK FIRE INSURANCE COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

65

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272 I.A. 609[3]

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago in favor of the plaintiff for the sum of $1,625 on the verdict of a jury. The plaintiff filed a statement of claim on November 30, 1926, alleging, in substance, that the defendant issued its fire insurance policy, No. F. 33766 for $1500, insuring the plaintiff against direct loss and damage to the contents of a brick building occupied by the plaintiff at 524 South Robey street, Chicago, Illinois, which contents consisted of fixtures, groceries and butcher's supplies, the term of which was from October 24, 1925, to October 24, 1926; that the premium was paid and that during the term of the policy on January 12, 1926, from causes unknown to the plaintiff, he suffered a direct loss by fire to his property, of the value of $3,000; that the plaintiff gave notice of the loss on or about January 13, 1926, and stated to the defendant the amount of damage and loss; that the plaintiff complied with the conditions of the policy, except only such as had been waived by the defendant. Thereafter on January 21, 1930, plaintiff filed his amended statement of claim by leave of court, which contains the same allegations as are offered in the first statement of claim filed by the plaintiff, except that the plaintiff stated that in the latter part of February, 1926, plaintiff demanded payment of the benefits under said policy, and thereupon the defendant accused the plaintiff with having caused the fire, and refused to pay the monies due under

Opinion filed Oct. 25, 1935

MR. JUSTICE HARRY SMITHMAN DELIVERED THE OPINION OF THE COURT:

This is an appeal by the defendant from a judgment entered in the Municipal Court of Chicago in favor of the plaintiff for the sum of $1,255 on the verdict of a jury. The plaintiff filed a statement of claim on December 30, 1932, alleging, in substance, that the defendant issued its fire insurance policy, No. F, 22755 for $1500, insuring the plaintiff against direct loss and damage to the contents of a brick building occupied by the plaintiff at 324 South Ashby street, Chicago, Illinois, which contents consisted of fixtures, groceries and butcher's supplies, the term of which was from October 24, 1932, to October 24, 1933; that the premium was paid and that during the term of the policy on January 12, 1933, from causes unknown to the plaintiff, he suffered a direct loss by fire to his property, of the value of $3,000; that the plaintiff gave notice of the loss on or about January 12, 1933, and stated to the defendant the amount of damage and loss; that the plaintiff complied with the conditions of the policy, except only such as had been waived by the defendant. Thereafter on January 21, 1933, plaintiff filed his amended statement of claim by leave of court, which contains the same allegations as are offered in the first statement of claim filed by the plaintiff, except that the plaintiff stated that in the latter part of February, 1933, plaintiff demanded payment of the benefits under said policy, and thereupon the defendant informed the plaintiff with having caused the fire, and refused to pay the losses due under

its said policy; that because of the refusal of the defendant to pay the monies due under this policy it did not become necessary for plaintiff to give notice to the defendant of the occurrence of the fire, or to file proof of loss as required in and by said policy.

Thereupon an amended affidavit of merits of the defendant to the amended statement of claim was filed April 28, 1932, which was to the effect that the plaintiff did not suffer the loss by fire; that said fire was caused by the wilful and intentional act of the plaintiff.

No notice or sworn proofs of loss was given to the defendant. No demand was made of the defendant for payment, nor did the defendant deny liability, and there was no waiver of notice of the fire and no waiver of proofs of loss; that there was a chattel mortgage on the property in violation of the terms of the policy.

The plaintiff's amended statement of claim, filed on January 21, 1930, states a new or different cause of action, and was filed more than twelve months after the time of the fire, which was alleged to have occurred on January 12, 1926, therefore plaintiff's action by his amended statement of claim was not commenced within twelve months next after the happening of the fire, and any suit for the recovery of any claim under the policy would not be sustainable in any court of law.

The defendant filed an amendment to its affidavit of merits, in which it alleged that on April 9, 1931, a judgment was entered in the Appellate Court of Illinois, First District, against the plaintiff and in favor of the defendant for the sum of $294.50, upon a former appeal, together with interest on said sum at the rate of 5% per annum from April 9, 1931, and that said judgment remains unsatisfied.

The plaintiff states in his brief that the statement of facts set forth in defendant's brief is substantially correct.

the said policy; that because of the refusal of the defendant to pay the sums due under this policy it did not become necessary for plaintiff to give notice to the defendant of the occurrence of the fire, or to file proof of loss as required in and by said policy.

Thereupon an amended affidavit of merits of the defendant to the amended statement of claim was filed April 28, 1920, which was to the effect that the plaintiff did not notify the insurer by first that said fire was caused by the wilful and deliberate act of the plaintiff.

No notice or sworn proofs of loss was given to the defendant. No demand was made of the defendant for payment, nor did the defendant deny liability, and there was no waiver of notice of the fire and no waiver of proofs of loss; that there was a material breach on the property in violation of the terms of the policy.

The plaintiff's counsel presented at trial, filed on January 21, 1920, stated a new or different cause of action, and was filed more than twelve months after the time of the fire, which was alleged to have occurred on January 13, 1920, therefore plaintiff's action by its amended statement of claim was not commenced within twelve months next after the happening of the fire, and any suit for the recovery of any claim under the policy could not be maintainable in any court of law.

The defendant filed an amendment to its affidavit of merits, in which it alleged that on April 8, 1921, a judgment was entered in the Appellate Court of Illinois, First District, against the plaintiff and in favor of the defendant for the sum of $294.50, upon a former suit, together with interest on said sum at the rate of 5% per annum from April 6, 1920, and that with interest remain unsatisfied.

The plaintiff states in his brief that the statement of facts set forth in defendant's brief is substantially correct.

It appears that at the trial the plaintiff offered in evidence the bilateral contract or insurance policy, the subject of this litigation, and it was received in evidence over the objection of the defendant on specific grounds of variance.

It also appears from the evidence that the plaintiff was engaged in the butcher and grocery business at the time the fire occurred, about 12:30 o'clock on the night of January 12, 1936; that the plaintiff in purchasing the interest of a partner in this business, gave the partner a chattel mortgage and still owed $400 or $500 on this chattel mortgage at the time of the fire; that the plaintiff locked up the store on the night of the fire about 8:30, and that no one had a key to the lock except the plaintiff, and when he left, there were about 300 pounds of fresh meat in the refrigerator, 120 live chickens in coops, and fixtures, and that the purchase price of the fixtures and merchandise amounted to $2800; that the plaintiff went home had dinner and attended a butcher union meeting fifteen or twenty minutes distant from his store and from his home; he left the union meeting about eleven o'clock, stopped for coffee at a restaurant and testified that he got home near midnight. Plaintiff claims that he did not go back to the store that night, and that he first knew of the fire about 1:00 A. M. when police officers came to his home and arrested him and put him in a prison cell because he had an insurance policy.

He remained in jail until March 1st or 2d and then saw the store for the first time after the fire. He said that he never went there again. Everything, fixtures and merchandise, was destroyed; no merchandise could be seen or identified, nor could some of the fixtures. He and a friend a Dr. Henkin were at the insurance agency, from which he got his policies, the same or next day, where he told

It appears that at the trial the plaintiff attempt to evidence the existence of insurance policy, the subject of this litigation, and it was contended in evidence over the objection of the defendant on specific grounds of variance.

It also appears from the evidence that the plaintiff was engaged in the business and grocery business at the time the fire occurred, about 12:30 o'clock on the night of January 12, 1958; that the plaintiff in purchasing the interest of a partner in this business, gave the partner a chattel mortgage and still owed $800 or $900 on this chattel mortgage at the time of the fire; that the plaintiff locked up the store on the night of the fire about 9:30, and that he had a key to the lock except the plaintiff, and when he left, there were about 800 pounds of fresh meat in the refrigerator, 120 live chickens in coops, and fixtures, and that the purchase price of the fixtures and merchandise amounted to $8000; that the plaintiff had been had dinner and attended a Masonic Lodge meeting fifteen or twenty minutes distant from his store and from his home; he left the Lodge meeting about eleven o'clock, stopped the auto at a restaurant and testified that he got home near midnight. Plaintiff claims that he did not go back to the store that night, and that he first knew of the fire about 1:00 a. m. when police officers came to his home and arrested him and put him in a prison cell because he had no insurance policy.

He finished in jail until about 5:45 or so and then was released for the first time after the fire. He said that he never went there again. Everything, fixtures and merchandise, was destroyed; no merchandise could be seen or identified, nor could some of the fixtures. He and a friend a Mr. Hunkin were at the insurance agency from noon on for his policies, the same or next day, where he talk

the company's agent he sustained a loss of $3,000, and claimed such amount, the total of his two policies; the agent told him they would pay nothing because plaintiff caused the fire. Three or more months after the fire, plaintiff went to see a lawyer and then made a list or inventory, which the plaintiff testified was made from his memory, of the contents of the store existing before the fire. This list totaling $3,293.24, was read to the jury.

On the part of the defendant the evidence shows that two uniformed officers of the City of Chicago, Emmett McHugh and John Touhy, were driving a police car west on Harrison street the night of the fire. About 12:30 A. M. as they approached Robey street they saw a man apparently looking the front door of plaintiff's store. The man started walking north on Robey and the police officers stopped on Harrison Street, just west of Robey, at the police patrol box across the sidewalk from the door of the store. McHugh got out of the car, tried the door, found it locked, and as he did so, looking toward the back of the store he saw a flame and knew that it was a set fire, a "touch-off" and at once started after the man who had just locked the door.

The officers ran after the man, who also ran. They called on him to halt and when he did not do so, each officer fired a shot at him.

A light snow had fallen just before midnight, about one-half inch deep at the time, and the police officers and detectives set about following the footprints in the snow which had been made by the fleeing man. When the tracks had been followed as far as the passageway on Congress street, officer McHugh left the others, got in his car and went back to the store. He found the fire department and a small crowd of onlookers there; one of the latter in shirt sleeves,

the company's agent he mortgaged a lot of "stuff", and claimed much damage, the total of the two policies; the agent told him they would pay nothing because plaintiff caused the fire. Three or more months after the fire, plaintiff went to see a lawyer and then made a list of everything, which the plaintiff testified was made from his memory, of the contents of the store existing before the fire. This list totaling $2,000.00, was read to the jury.

On the part of the defendant the witnesses were both two uniformed officers of the city of Chicago, Robert Kotsis and John Tomby, who during a period of two weeks or thereabout every night of the fire. About 12:30 A. M. on each succeeding night they saw a man apparently looking the front door of plaintiff's store. The man started walking north on Robey and the police officers followed on Harrison Street, just west of Robey, at the police patrol box across the sidewalk from the door of the store. Kotsis got out of the car, tried the door, found it locked, and he did not. Looking toward the back of the store he saw a flame and knew that it was a set fire, a "burn-off" and at once started after the man who had just looked the door.

The officers had after the man, who also ran. They called to him to halt and when he did not do so, each officer fired a shot at him.

A light snow had fallen just before midnight, about one-half inch deep at the time, and the police officers and detectives not about following the footprints in the snow which had been made by the fleeing man. When the trucks had been followed as far as the passageway on Congress street, officer Kotsis left the others, got in his car and went back to the store. He found the fire department and a small crowd of onlookers there; one of the latter in shirt sleeves,

knew where the owner lived and went with McHugh to point out the house. Plaintiff lived in the basement flat in that house, and when the guide and McHugh reached the place, the detective squad had already arrived there. The detectives knocked at the door and after four or five minutes an elderly man admitted them. McHugh went with them, and they went into the bedroom and there McHugh identified the plaintiff as the man who had closed the store door and at whom he had shot; he directed the detectives to take plaintiff in custody.

The next morning after the fire, plaintiff was taken to the office of the City Fire Attorney, at whose request J. W. Fenniston, a special agent of the Arson Department, National Board of Fire Underwriters, interrogated the plaintiff. He, the plaintiff, said that he and a partner bought the store seventeen months earlier for $1,550; that they made some repairs in it, and then he purchased his partner's interest for $800; and on the day of the fire the merchandise in the store was of the value of $300 or $400 and the fixtures were worth $2,500.

In the first half of March, 1926, Charles Wohlleben went to the scene of the fire to make an inventory. His business for a period of 25 years has been making schedules or inventories of fire losses. From their office record it appears that this concern represented Antonio Pandolfi. He testified that he was almost certain that it was the plaintiff who unlocked the door for him and let him in the store at 524 South Robey Street. He described the fixtures which he saw there; those in front of the partition and ice box were not burned in any degree, but all of them were affected by smoke, and the varnish on the shelves was raised by the heat. The merchandise was smoked up, but all of it could be distinguished and was scheduled by him. The schedule this witness had made was read; it listed

Elder where the money lived and went with Bodgin to point out the house. Blakiston lived in the basement flat in that house, and when the police had finally reached the place, the detective found that already entered twice. The detective knocked at the door and after four or five minutes an elderly man admitted them. Bodgin went with them, and they went into the bedroom and there Bodgin identified the plaintiff as the man who had shared the store door and at whom he had shot; he directed the detectives to take plaintiff in custody.

The next morning after the fire, plaintiff was taken to the office of the city fire marshal, at Adams street & W. Jackson, a special agent of the Aetna Insurance Company, Richard Smith of the Commercial Insurance, interrogated the plaintiff. He, the plaintiff, said that he had a partner bought the store premises months earlier for $1,500; that they took some jewelry in it, and then he purchased the partner's interest for $800; and on the day of the fire the merchandise in the store was of the value of $800 or $900 and the fixtures were $1,200.

In the first half of June, 1908, Charles Hollidon sent to the house of the fire to make an inventory. His business for a period of 30 years has been making schedules or inventories of fire losses. From their office record it appears that this concern represented Aetna Insurance Company. He testified that he was almost certain that it was the plaintiff who unlocked the door for him and let him in the store at 324 South Ashland Street. He described the fixtures which he saw there; those in front of the partition had been more burned in any degree, but all of them were affected by smoke, and the writing on the shelves was ruined by the heat. The merchandise was smoked up, but all of it could be distinguished and was scheduled by him. The schedule this witness had made was read; it listed

merchandise of the value of $127.63, with a loss claim of $68.50, and fixtures of a cost value of $1,127, with a loss claim of $422. The total of the loss claims listed is $490.50.

There is evidence that persons in charge of the office of Furnell Dudley Company, the agency which issued the defendant's policy to the plaintiff, knew nothing of the fire until five or six months after it happened. It had not been reported nor had any one come in to discuss it until five or six months after the fire.

It appears from the record that the plaintiff has not paid the defendant's judgment for costs obtained on the prior appeal to this Court. After being orally instructed by the court, the jury retired and returned a verdict as hereinbefore mentioned.

There is a dispute in the evidence as to the cause of the fire and the value of the personal property destroyed.

The point is made by the defendant that the court erred in refusing to direct a verdict for the defendant upon the ground that the giving of immediate notice of loss as provided for in the policy of insurance, was a condition precedent to any recovery by the plaintiff. In an appeal to this court in the case of Tallarico v. Newark Fire Ins. 260 Ill. App. 638, in passing upon this question of notice and contractual limitation fixed in the contract, we said:

> "It is well to have in mind that the plaintiff alleged in the original statement that he complied with each and every requirement of said policy, except only such performance as had been waived by the defendant. The rule uniformly announced has been that if additional counts in a declaration state a new cause of action or a different cause of action from that originally stated, a plea of the statute of limitations is good. In the instant case, however, performance in the filing of a notice and proof of loss was excused by the denial of liability for the loss by the defendant. This evidence of waiver would have been competent under the plaintiff's original statement of claim. That being so it cannot be logically or truthfully said that the amended statement of claim stated a different cause of action. The amended statement made specific that which was alleged in general terms in the original statement of claim. Chicago General Ry. Co. v. Carroll, 189 Ill. 273.

warehousing of the value of $147.40, with a loss claim of $98.80, and diatoms of a max value of $1,117, with a loss claim of $100. The total of the loss claims listed is $295.20.

There is evidence that persons in charge of the offices of Imperial Dodge Company, the agency which issued the warehouse's policy to the plaintiff, some months before and five weeks after or six months after it happened. It had not been reported nor had any one come in to discuss it until five or six months after the fire.

It appears from the record that the plaintiff has not paid the defendant's judgments for costs obtained on the prior appeal to this Court. After being weekly statements by the court notice and returned a verdict on Interlocutory motions.

There is a dispute in the evidence as to the cause of the fire and the value of the personal property destroyed.

The point is made by the defendants that the court erred in refusing to direct a verdict for the defendant upon the ground that the giving of insurance notice of loss as provided for in the policy of insurance, was a condition precedent to any recovery by the plaintiff. In so ruling to this court in the case of Pelletier v. Insurance Co. Inc. 285 Ill. App. 328, in passing upon this question of notice and contractual limitation fixed in the contract, we said:

> "It is well to bear in mind that the plaintiff alleges in the original statement that he complied with and every requirement of said policy, except only such requirements as had been waived by the defendant. The trial without argument has been that it constituted cause in a dollar action arise a new cause of action or a different cause of action from that originally stated, a plea of the statute of limitations is good. In the review here, however, argument in the light of a motion and proof of loss was excused by the denial of liability for the loss by the defendant. This evidence of waiver could have been sufficient under the plaintiff's original statement of claim. That being so it cannot be logically or reasonably said that the amended statement of claim merely, differently states or states. The amended statement merely specifies that which was alleged in general terms in the original statement of claim. Gulbenkian v. Ins. Co., 1 Ill. App. 3d 112, 117.

We condlude, therefore, that the filing of the amended statement of claim was not barred by the policy of limitation of one year."

We still adhere to what was there said, and as controlling not alone as to the giving of the notice of loss, but also upon the question of the limitation fixed by the contract. This court is in accord with the defendant that the filing of a notice of loss by fire must be given to the defendant within a reasonable time, and what is a reasonable time is usually for a jury. The law is that a provision in the policy of insurance requiring the insured to give immediate notice of a loss in writing is not to be taken literally, but only requires that notice shall be given with due diligence under the circumstances of the case and without unnecessary and unreasonable delay. Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Knickerbocker Ins. Co. v. McGinnis, 87 Ill. 70. However, where an insurance company before notice of loss or proofs are furnished, refuses to pay such loss, such proofs are waived. St. Onge v. Hartford Fire Ins. Co., 204 Ill. App. 127; U. S. Health & Accident Ins. Co. v. Harvey, 129 Ill. App. 104. The defendant will be estopped from insisting upon that which has been waived. Williamsburg City Ins. Co. v. Cary, 83 Ill. 453. The trend of authorities is that a denial of liability waives not only the notice of loss, but also the proof of loss. Queen Ins. Co. of America v. Delphi Strawboard Co. 128 N. E. 697 (Ind. App. Ct.) Cottrell v. Ins. Co., 145 Ia. 651. National Live Stock Ins. Co. v. Elliott, 60 Ind. App. 112; Elliott v. Hail Assn. 160 Ia. 105. The evidence in this case is to the effect that the plaintiff was arrested at the time of the fire; was incarcerated in a prison until he was released on the 2nd or 3rd of March, 1923. Immediately thereafter the defendant, together with a friend, Dr. Henkin, visited the agents of the defendant regarding his claim of loss by fire

be sensible, therefore, that the filing of the required statement of claim had not waived by the delay of liquidation of one year.?

It still remains to deal the there is, and is controlling not alone as to the giving of the notice of loss, but also upon the question of the limitation fixed by the contract. This court is in accord with the determination that the filing of a notice of loss by fire must be given to the defendant within a reasonable time, and that is a reasonable time is usually for a jury. The law is that a provision in the policy of insurance requiring the insured to give immediate notice of a loss in writing is not to be taken literally, but only requires that notice shall be given with due diligence under the circumstances of the case and without unnecessary and unreasonable delay. Phoenix Fire Ins. Co. v. Simmons, 126 Ill. 244; Liverpool etc. Ins. Co. v. Kuhlmann, 27 Ill. 7. However, where an insurance company before notice of loss or proofs are furnished, refuses to pay such loss, such proofs are waived. Id. Cum v. Hartford Fire Ins. Co., 104 Ill. App. 147; Ins. Co. v. Smith & Landon Ins. Co. v. Burter, 140 Ill. App. 104. The defendant will be estopped from insisting upon that which has been waived. Williamsburg City Ins. Co. v. Dunn, 82 Ill. 493. The trend of authorities is that a denial of liability waives not only the notice of loss, but also the proof of loss. Queen Ins. Co. of America v. Lalor Iron Works, 118 S. W. 807 (Ind. App. 1909.) Dennis v. Ins. Co., 141 Ia. 492. Phoenix Ins. Co. v. Allen, 65 Ind. App. 1. Liverpool etc. Ins. Co. v. Kuhlmann, 140 Ia. 120. The evidence in this case is to the effect that the plaintiff was informed at the time of the fire; was interrogated in a manner which he was informed on the 2nd of March, 1910. Immediately thereafter the defendant, together with a friend, Mr. Smith, visited the agents of the defendant requesting his claim of loss by fire

under the policy, and the agent then stated to the plaintiff in the presence of this friend that the defendant would not pay for the loss because the plaintiff caused this fire, and as a result of the complete denial of liability in any form, there was nothing further that the plaintiff could do except to institute a suit to determine the question, and whether or not the plaintiff was entitled to a judgment for his loss. The evidence indicates that the defendant denied liability, not because of any want of notice or proof of loss, but because the defendant was of the opinion that the plaintiff was responsible for the fire that took place. It certainly would have been an absurdity for the plaintiff to make an effort to comply with the provisions of the policy in question under the circumstances.

The point has been called to the attention of this court that when the plaintiff executed a chattel mortgage covering the personal property subject to insurance and thereby encumbered it, such policy became void. This defense was not urged upon the former appeal of this case and was not passed upon by this court. Tallarico v. Union Assurance Society, Ltd., Gen. No. 34,692, but from the record was presented for the first time by the defendant upon the retrial of the case. The defendant amended his affidavit of merits, which included this defense and which was not objected to by the plaintiff.

The evidence is without contradiction that the defendant, in order to buy the interest of Pandolfi, his former partner in the business covered by the policy of the defendant, executed and delivered as part payment a chattel mortgage upon the chattels that were insured by the policy in controversy, and that the principal of the chattel mortgage of $700 was reduced from the date of its execution until the time of the fire to $400 or $500. The policy provides that the policy shall be void "if the subject of insurance be personal property and be or become encumbered by chattel mortgage." Plaintiff is bound by the terms of the policy unless the defendant waived this provision, or by its conduct was estopped from taking advantage of it. In the

under the policy, and the agent then stated to the plaintiff in the presence of this friend that the defendant would not pay for the loss because the plaintiff caused this fire, and as a result of the complete denial of liability in any form, there was nothing further that the plaintiff could do except to institute a suit to determine the question, and whether or not the plaintiff was entitled to a judgment for his loss. The evidence indicates that the defendant denied liability, not because of any want of notice or proof of loss, but because the defendant was of the opinion that the plaintiff was responsible for the fire that took place. It certainly would have been an absurdity for the plaintiff to make an effort to comply with the provisions of the policy in question under the circumstances.

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The evidence is without contradiction that the mortgagee, in order to buy the interest of Zanolli, his former partner in the business covered by the policy of the defendant, executed and delivered as part payment a chattel mortgage upon the chattels that were insured by the policy in controversy, and that the principal of the chattel mortgage of $700 was reduced from the date of its execution until the time of the fire to $400 or $500. The policy provides that the policy shall be void "if the subject of insurance be personal property and be or become encumbered by chattel mortgage." Plaintiff is bound by the terms of the policy unless the defendant waived this provision, or by its conduct was estopped from taking advantage of it. In the

case of Butler v. Security Ins. Co. 244 Ill. App. 379, the court, in passing upon the question that is pertinent in the instant case quoted from the Crikelair case as follows:

> "By the stipulation in the policy, the terms of which are plain, direct and unambiguous, the parties hereto agreed that if the insured property, at the time the insurance was effected, was encumbered by chattel mortgage, the indemnity should not attach but the policy should be void. This was the contract of the parties deliberately made, and the only question presented is, whether they are bound by it. They were competent to enter into the stipulation, no rule of law was contravened by it, and there is no ground apparent to us upon which to base a claim of either estoppel or waiver.
>
> "The law declared by the greater weight of authority is, that where a policy contains a stipulation such as the one in the case at bar, and the property be, at the time of the execution of the policy, covered by a mortgage, no recovery can be had unless it appears that there was a waiver or estoppel by which the company is precluded from relying on the contract. It was so expressly ruled in Wilcox v. Continental Ins. Co. 55 N. W. Rep. 188 Wierengo v. American Fire Ins. Co. 57 id. 833, Smith v. Columbia Ins. Co. 17 Fa. St. 253, Pennsylvania Ins. Co. v. Cottsman, 48 id. 151, and Fitchburg Bank v. Amazon Ins. Co. 135 Mass. 431. The principle upon which these decisions rest was recognized and applied by this court in Reaper City Ins. Co. v. Brennan, 58 Ill. 158, and Hebner v. Palatine Ins. Co. 157 id. 144."

The plaintiff's answer to the defendant's contention is that the provision relating to chattel mortgages does not apply to an encumbrance that is less than the whole of the chattels covered by the insurance policy, and the plaintiff contends that the words, "the subject of insurance be personal property," used in the policy, mean the entire property covered by the policy. In other words, the policy is divisible. The Supreme Court in Capps. v. National Union Fire Ins. Co. 318 Ill. 350, in passing upon a somewhat analogous case, said:

> "After a careful consideration of the cases cited and others dealing with the subject, we think the rule supported by reason and by the great weight of authority is, that where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items the policy should be regarded as entire and indivisible, but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy should be regarded as severable and divisible." Quoting a large number of cases.

case of Dolan v. Insurance Co., 124 Ala. App. 372, 1st court, in passing upon the question that is presented in the instant case quoted from the Tennessee case as follows:

"If the provision in the policy, the terms of which are plain, direct the manner, the courts should enforce that if the insured property, at the time the insurance was effected, was mortgaged by another mortgage, the insured should not claim that the policy should be void. This was the manner of the parties relatively with the and the only question presented is, whether they have made it. They were competent to make the stipulation, be held at law and enforced it, and there is no ground upon which we can hold a clause of policy enforced or policy.

"The law designed by the general judge of jurisprudence is that where a policy contains a stipulation such as the one in the case at bar, and the property, in the time of the execution of the policy, secured by a mortgage, or property on the back whose is secure that there is no a policy to return by which the property is protected from subjects the contract. If we are mistaken, point it out."

Insurance Co. v. Lee, 21 Ala. 779; Insurance Co. v. Lewis, 27 Ala. 500; Insurance Co. v. Ins. Co., 27 Ala. 604; Insurance Co. v. Ins. Co., 27 Ala. 607; Insurance Co. v. Ins. Co., 27 Ala. 608; Insurance Co. v. Ins. Co., 27 Ala. 609; Insurance Co. v. Ins. Co., 27 Ala. 610; Insurance Co. v. Ins. Co., 27 Ala. 611. The principle upon which these decisions rest was recognized and applied by this court in Sanger Clay Ins. Co. v. Freeman, 27 Ala. 612; and Tabner v. Insurance Ins. Co., 27 Ala. 12.

The plaintiff's answer to the defendant's contention is that the provision relating to chattel mortgages does not apply to an insurance that is less than the value of the chattels covered by the insurance policy, and the plaintiff contends that the words, "the subject of insurance be personal property," used in the policy, mean the entire property covered by the policy. In other words, the policy is divisible. The Supreme Court in Dolan v. National Union Fire Ins. Co., 232 Ill. 327, in passing upon a somewhat analogous case, said:

"After a careful consideration of the cases cited and others dealing with the subject, we think the rule announced by reason and by the great weight of authority is, that where the property is so situated that the risk on one item assumes an element wholly distinct from the risk on the other items the policy should be regarded as divisible and indivisible, but where the property is so situated that the risk on each item is practically the same as the risk on the other items, the policy should be treated as indivisible and attorn for risk on one item does not affect the risk on the others. The policy should be treated as divisible and indivisible." Quoting a large number of cases.

It is apparent from an examination of the policy in question that this property is not so situated that the risk on each item is separate and distinct from the others. Such being the fact, and applying the above cited rule of the Supreme Court, the contract is not such as could be divisible.

The plaintiff also contends that the evidence in the record discloses that the amount due under the chattel mortgage is payable upon the installment plan. The policy provides that the purchase of property on the installment plan with a chattel mortgage thereon shall not invalidate the policy of insurance. While it is true that there is evidence that payments have been made upon several occasions, which reduced the principal to $400 or $500, still there is nothing in the record which would indicate that the chattel mortgage itself is an installment contract.

The facts are that the interest of the plaintiff's partner was purchased, and in payment of this interest in the partnership property, the plaintiff executed the chattel mortgage upon the property insured. We are of the opinion that the admitted execution by the plaintiff of a chattel mortgage which encumbered the chattels insured violates the provision that the policy shall be void if the personal property insured shall become encumbered by a chattel mortgage and precludes, as a matter of law, a recovery from the defendant. Therefore the judgment is reversed with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find that at the time the policy of insurance was issued the property of the plaintiff was encumbered by a chattel mortgage which voided the policy, and that said chattel mortgage was not upon property purchased on the installment plan.

HALL, P.J. AND WILSON, J. Concur.

It is apparent from an examination of the policy in question that this property is not so situated that the risk on such item is separate and distinct from the others. Upon this fact, and applying the above stated rule of the Supreme Court, the judgment in such as could be distinct.

The plaintiff then attempts with the reluctance in the insured claimed that the owner has made the special assessments in question upon the installment plan. The policy provides that the insured of property on the installment plan with a chattel mortgage thereon shall not invalidate the policy of insurance. While it is true that there is evidence that witnesses have been made upon several occasions, which relieved the principal to pay on time, still there is nothing in the record which would indicate that the chattel mortgage itself is an installment contract.

The facts are that the interest of the plaintiff's property was pledged, and in payment of this interest in the partnership property, the plaintiff executed the chattel mortgage upon the property insured. In use of the opinion that the chattel execution by the plaintiff of a chattel mortgage which encumbered the chattels insured violates the provision that the policy shall be void if the insured property insured shall become encumbered by a chattel mortgage and therefore, as a matter of law, a recovery from the defendant. Therefore the judgment is reversed with a finding of fact.

INCORRECT REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find that at the time the policy of insurance was issued the property of the plaintiff was encumbered by a chattel mortgage which voided the policy, and that said chattel mortgage was not such property purchased on the installment plan.

BAIL, J.J. DE CASTRO, J. CONCUR.

36230

HABEL, ARMBRUSTER & LARSEN COMPANY, a Corporation, Appellant, v. JOSEPH GRAZIANI, et al., Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 609

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for the defendant entered in the Municipal Court of Chicago on July 27, 1932, in an action of replevin, in which the court entered a finding, without a jury, that the property was in the defendant and that the defendant recover from the plaintiff the possession of the property involved and the costs expended. Judgment was entered on this finding.

On October 21, 1931, the defendants, Enrico Gattone and Joseph Graziani, being indebted to the plaintiff in the sum of $6,000, executed a chattel mortgage note, by the terms of which they promised to pay the plaintiff the sum of $6,000, in payments of $200 a week consecutively succeeding the date of the promissory note, until the sum of $6,000 was paid, with interest at 6% per annum, payable weekly. To secure the payment of this note, said Graziani and Gattone executed a chattel mortgage on all the chattels described therein and located at 919 South Western avenue, Chicago, Illinois. The chattel mortgage was acknowledged before the clerk of the Municipal Court and recorded in the Recorder's Office of Cook County. Thereafter the defendants defaulted in making payments, which were due in 1931, and thereupon the chattel mortgage was foreclosed.

The mortgagors were left in possession after a conference between the plaintiff's attorneys and the attorneys for the mortgagors.

The established rule is that it is the duty of the

ANTON, ANACONDIKIS & LAURIE COMPANY, a Corporation, appellant, v. JOHN GHASIANI, et al., Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for the defendant entered in the municipal Court of Chicago on July 27, 1933, in an action of replevin, in which the court entered a finding, without a jury, that the property was in the defendant and that the defendant recover from the plaintiff the possession of the property involved and the costs expended. Judgment was entered on this finding.

On October 21, 1931, the defendants, Enrico Gattone and Joseph Orsiani, being indebted to the plaintiff in the sum of $6,000, executed a chattel mortgage note, by the terms of which they promised to pay the plaintiff the sum of $6,000, in payments of $300 a week consecutively succeeding the date of the promissory note, until the sum of $6,000 was paid, with interest at 8% per annum, payable weekly. To secure the payment of this note, said Orsiani and Gattone executed a chattel mortgage on all the chattels described therein and located at 319 South Western avenue, Chicago, Illinois. The chattel mortgage was acknowledged before the clerk of the Municipal Court and recorded in the Recorder's Office of Cook County. Thereafter the defendants defaulted in making payments, which were due in 1932, and therefore the chattel mortgage was foreclosed.

The mortgagors were left in possession after a conference between the plaintiff's attorneys and the attorneys for the mortgagors.

The established rule is that it is the duty of the

mortgagee, after default in payment, to take possession of the personal property described in the chattel mortgage within a reasonable time as against subsequent purchasers and creditors, in order that the chattels shall remain subject to the lien. From the evidence, it appears that that is just what the plaintiff, as mortgagee, did in this case. Upon default of the mortgagors, the chattel mortgage was foreclosed, and by such act the plaintiff holds both title and possession.

Just what took place in the foreclosure of this mortgage is not altogether clear. However, it is not denied by the defendants that the chattel mortgage was foreclosed, but rather it is admitted that such proceeding took place, according to their statement of facts.

It is also the law that upon a default by the mortgagor in making the payments provided for in the chattel mortgage, the mortgagee, having legal title, has the right to take possession of the chattels by foreclosure. Callagan et al v. American Trust & Savings Bank, 196 Ill. App. 102.

From the record it is apparent that the mortgagee did obtain possession by foreclosure, and by an arrangement with the mortgagors permitted them to remain in possession.

One other question merits consideration, and that is, did the Viviano Macaroni Mfg. Co., a creditor or subsequent purchaser, by title obtain possession of the chattels, and are its rights superior to those of the plaintiff.

The fact that the mortgagors were in possession, in and of itself is not evidence of fraud, but such possession may be explained, such as where title is in the mortgagee and the chattels have been reduced to possession on default, the mortgagee as owner may allow the mortgagors to use the chattels for the owner's benefit,

mortgagee, after default in payment, to take possession of the personal property described in the chattel mortgage within a reasonable time at proper subsequent purchasers and creditors, in order that the chattels shall remain subject to the lien. From the evidence, it appears that that is just what the plaintiff, as mortgagee, did in this case. Upon default of the mortgagor, the chattel mortgage was foreclosed, and by such act the plaintiff holds both title and possession.

Just what took place in the foreclosure of this mortgage is not altogether clear. Answer, it is not denied by the defendants that the chattel mortgage was foreclosed, but rather it is admitted that such proceeding took place, according to their statement of facts.

It is also the law that such a default by the mortgagor in making the payments provided for in the chattel mortgage, the mortgagee, having legal title, has the right to take possession of the chattels by foreclosure. Williams et al v. Western Trust & Savings Bank, 199 Ill. App. 109.

From the record it is apparent that the mortgagee did obtain possession by foreclosure, and by so attempting with the mortgagors permitted them to remain in possession.

One other question merits consideration, and that is, did the Vivian Mercantile Co., a creditor or subsequent purchaser, by title obtain possession of the chattels, and are its rights superior to those of the plaintiff.

The fact that the mortgagors were in possession, in and of itself is not evidence of fraud, but such possession may be explained, such as where title is in the mortgagee and the chattels have been returned to possession on default, the mortgagee as owner may allow the mortgagors to use the chattels for the owner's benefit,

and this fact may be proved by satisfactory evidence. Funk et al, v. Staats, 24 Ill. 633.

It is evident that one Peter Viviano, agent and officer of the defendant, Viviano Macaroni Mfg. Co., had knowledge of the mortgage conveying the chattels to the plaintiff, and, in fact, that he offered the plaintiff $500 to satisfy the mortgage lien. It is not clear from the record by what means the defendant Viviano Macaroni Mfg. Co. obtained possession of the chattels in question. The defendants did not offer any evidence, and in view of the failure to offer evidence to establish the right of the defendant to possession, the judgment entered in this case is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

and this fact may be proved by satisfactory evidence. Ibid. et al. v. Ibid., 24 Ill. 228.

It is evident that one Otis Tiffany, agent and attorney of the defendant, Tiffany Commercial Mfg. Co., had knowledge of the mortgage covering the chattels to the plaintiff, and, in fact, that he offered the plaintiff $500 to satisfy the mortgage lien. It is not clear from the record by what means the defendant Tiffany Commercial Mfg. Co. obtained possession of the chattels in question. The defendants did not offer any evidence, and in view of the failure to offer evidence to establish the right of the defendant to possession, the judgment entered in this case is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Ellis, P.J. and Black, J. concur.

36239

LEONARD C. REID,

Appellee,

v.

GEORGE G. WEST, doing business as PERFECTION AUTO STATION, and MEYER ROTHSCHILD,

Defendants,

On Appeal of MEYER ROTHSCHILD,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

272 I.A. 609

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, entered upon the verdict of a jury in an action of trespass on the case, wherein Leonard C. Reid was the plaintiff and George G. West, doing business as Perfection Auto Station, and Meyer Rothschild were the defendants. The jury found the defendant George G. West not guilty, and the co-defendant Meyer Rothschild guilty, and assessed the amount of damages at $2400. Upon this verdict, judgment was entered, from which judgment Meyer Rothschild appeals.

The case was tried upon the first amended declaration filed by the plaintiff, in which the defendants joined issues. The plaintiff in his declaration alleges that both defendants committed independent acts of negligence, and that such acts combined caused the damages sustained by the plaintiff.

The plaintiff further alleges that he was the owner of a certain automobile stored in the public garage operated by West, one of the defendants; that while the agent of the plaintiff was having the tank of his automobile filled with gas by the agent of the defendant West, the attendant carelessly and negligently allowed the tank to be filled to overflowing, and that a quantity of gasoline

Appeal from
Circuit Court
Cook County.

212 I.A. 609

Opinion filed Oct. 28, 1925

MR. JUSTICE HUNEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, entered upon the verdict of a jury in an action of trespass on the case, wherein Leonard S. Reid was the plaintiff and George G. West, doing business as Interstate Auto Station, and Meyer Rothschild were the defendants. The jury found the defendant George G. West not guilty, and the co-defendant Meyer Rothschild guilty, and assessed the amount of damages at $2500. Upon this verdict, judgment was entered, from which judgment Meyer Rothschild appeals.

The case was tried upon the first amended declaration filed by the plaintiff, in which the defendants joined issue. The plaintiff in his declaration alleges that both defendants committed independent acts of negligence, and that such acts combined caused the damages sustained by the plaintiff.

The plaintiff further alleges that he was the owner of a certain automobile stored in the public garage operated by West, one of the defendants; that while the agent of the plaintiff was having the tank of his automobile filled with gas by the agent of the defendant West, the attendant carelessly and negligently allowed the tank to be filled to overflowing, and that a quantity of gasoline

was spilled upon the floor; that the defendant Rothschild negligently tossed a lighted match into the gasoline upon the floor and as a result of the combination of these separate acts of negligence, an explosion and fire occurred.

It appears that after the jury returned a verdict of guilty as to Rothschild and not guilty as to West, the plaintiff, by leave of court, filed a second amended declaration. This second amended declaration alleges in effect that certain gas vapors were around the rear of the plaintiff's automobile and that defendant West was negligent in failing to prevent the alleged throwing of the lighted match by the defendant Rothschild.

A general demurrer was filed to the second amended declaration, which was overruled by the court, and the court further ordered that the pleas of the defendants heretofore filed stand as pleas to the second amended declaration.

The facts disclosed by the testimony of witnesses are to the effect that on the morning of November 24, 1930, a fire occurred and damaged the plaintiff's automobile; that the fire took place in the garage where this car was stored, and that plaintiff's chauffeur, one Armstrong, called for the car and drove it to one of the gas pumps located in the garage for a supply of gasoline.

There is evidence that Armstrong shut off the engine; that one Roe, who was employed in the garage, proceeded to fill the tank of plaintiff's car, and while the tank was being filled with gasoline, the defendant Rothschild came into the garage and stopped opposite the front door of plaintiff's car to talk to Armstrong, who was sitting in the car; that the defendant West, the garage owner, came from his office and walked to a car standing about 35 feet from and facing the rear of plaintiff's car; that while the attendant Roe was filling the tank of the car, the telephone bell rang, and when

was alleged upon the theory that the defendant automobile negligently tossed a lighted match into the gasoline upon the floor and as a result of the combination of these separate acts of negligence, an explosion and fire occurred.

It appears that after the jury returned a verdict of guilty as to defendant and not guilty as to [illegible], by leave of court, filed a second amended declaration. This second amended declaration alleges in effect that despite the steps were around the rear of the plaintiff's automobile and that defendant was negligent in failing to prevent the alleged throwing of the lighted match by the defendant Rothschild.

A general demurrer was filed to the second amended declaration, which was overruled by the court, and the court further ordered that the pleas of the defendants heretofore filed stand as pleas to the second amended declaration.

The facts disclosed by the testimony of witnesses are to the effect that on the morning of November 24, 1930, a fire occurred and damaged the plaintiff's automobile; that the fire took place in the garage where this car was stored, and that plaintiff's chauffeur, one Armstrong, called for the car and drove it to one of the gas pumps located in the garage for a supply of gasoline.

There is evidence that Armstrong shut off the engine; that one Joe, who was employed in the garage, proceeded to fill the tank of plaintiff's car, and while the tank was being filled with gasoline, the defendant Rothschild came into the garage and stopped opposite the front door of plaintiff's car to talk to Armstrong, who was sitting in the car; that the defendant West, the garage owner, came from his office and walked to a car standing about 35 feet from and facing the rear of plaintiff's car; that while the attendant Joe was filling the tank of the car, the telephone bell rang, and when

Roe turned to answer it a few feet away, he left the nozzle of the hose in the tank of plaintiff's car; that just as Roe turned to answer the telephone call he noticed that the rear of plaintiff's car was in flames. There is evidence that just before the fire, defendant Rothschild, after lighting a cigar, threw the burning match to the rear of plaintiff's car and immediately an explosion followed. This evidence is denied by the defendant Rothschild.

The contention is made by Rothschild that where several acts are averred conjunctively and pleaded as interdependent or concurring causes of the injury, all of the several acts must be proved, and proof of a single act is not sufficient to sustain a verdict; that the verdict of not guilty as to the defendant West and of guilty as to defendant Rothschild is absolutely irreconcilable with plaintiff's theory of the accident as alleged in his declaration.

The amended declaration filed after the verdict, averred, among other allegations, that the tank of plaintiff's car was then and there being filled with gasoline, and that certain gas vapors were around the rear of the automobile; that Rothschild negligently threw a lighted match to the rear of the plaintiff's car, and that West was negligent in not preventing the throwing of the burning match by Rothschild. There is evidence in the record to support this allegation, and under Sec. 39 of Chap. 110 of the Practice Act, and Sec. 1 of Chap. 7, entitled, "Amendments and Jeofails," Cahill's Revised Illinois Statutes, it is permissible to allow amendments at any time before judgment which may enable the plaintiff to sustain his action. Such being the general rule, the question arises, did the court exercise proper discretion in permitting the filing of the amended declaration by the plaintiff after the verdict of the jury. It has been held that the statutes

was turned to answer it a few feet away, he left the nozzle of the hose in the tank of plaintiff's car; that just as he turned to answer the telephone call he noticed that the rear of plaintiff's car was in flames. There is evidence that just before the fire, defendant Rothschild, after lighting a cigar, threw the burning match to the rear of plaintiff's car and immediately an explosion followed. This evidence is denied by the defendant Rothschild.

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permitting amendments are very liberal, and that amendments are to be allowed upon terms that are just and reasonable, the purpose being that cases should be decided on their merits. First Nat. Bank of Hayward, Wis. v. Gerry, et al., 195 Ill. App. 513. Section 39 of Chap. 110 of the Practice Act provides in part as follows:

> "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, * * * which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense."

Section 1. of Chap. 7, Cahill's Ill. Rev. Statutes, provides:

> "That the court in which an action is pending shall have power to permit amendments * * * for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."

These statutory provisions would indicate that neither of the parties to an action shall be deprived of a substantial right, through defects or omissions in pleading, if the party acts within a reasonable time to amend his pleadings. In permitting the filing of amended pleadings the court should always be considerate of the rights of the respective parties to the litigation. In view of these statutory provisions the courts in a number of decisions have sustained the trial court in granting leave to file amendments to declarations after a verdict. Chicago & Eastern Ill. R. R. Co. v. Henderson, 126 Ill. App. 530; City of Chicago v. Shreffler, 175 Ill. App. 547; Postal Telegraph Cable Co. v. Likes, 124 Ill. App. 459; Blayney v. Cotton, 189 Ill. App. 205; Milwaukee Ins. Co. v. Schallman, 188 Ill. 213; Franke v. Hanly, 215 Ill. 216.

The amended declaration in this case did not allege any fact that surprised the defendant Rothschild. The facts in evidence would indicate a negligent act by Rothschild in throwing the burning match on the floor after lighting a cigar near where the automobile of the plaintiff was being filled with gasoline from a pump located in the garage. It is true that Rothschild denied this.

permitting amendments are very liberal, and that amendments are to be allowed upon terms that are just and reasonable, the matters being that cause should be decided on their merits. Ilgat Ent. Pack of Florida, Ltd. v. Lewis, et al., 180 Ill. App. 511. Section 29 of Chap. 110 of the Practice Act provides in part as follows:

> "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable. . . . which may affect the validity or merits of the action for which the plaintiff is now interested to be brought, or the defendant to make a legal defense."

Section 1. of Chap. 7, Ohio's Ill. Ann. Statutes, provides:

> "That the court in which an action is pending shall have power to permit amendments . . . for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered thereon."

Even statutory provisions could indicate that matters of the pleading to an action shall be deprived of a substantial right, through defects or omissions in pleading, if the party acts within a reasonable time to amend his pleading. In permitting the filing of amended pleadings the court should always be conscious of the rights of the respective parties to the litigation. In view of these statutory provisions the courts in a number of decisions have sustained the trial court in granting leave to file amendments to declarations after a verdict. Gilmore & Masters Ill. App. 1st 4, Swanson, 149 Ill. App. 390; City of Chicago v. Sheffler, 172 Ill. App. 347; Central Telegraph Co. v. Lane, 216 Ill. App. 449; Glover v. Lukes, 180 Ill. App. 400; Illinois Cent. R. R. v. Gardner, 192 Ill. App. 311; Kramer v. Hogan, 218 Ill. App. 216.

The amended declaration in this case did not allege any fact that convicted the defendant dishonesty. The facts in evidence would indicate a negligent act by defendant in throwing the burning match on the floor after lighting a cigar thus where the combustible of the plaintiff was being filled with gasoline from a pump located in the garage. It is true that defendant denied this.

The facts, however, are for the jury, and they passed upon them and determined the issues upon this question. It does not seem to this court that the defendant was prejudiced. The declaration was filed in order to enable the plaintiff to recover on the action intended. The amended declaration did not state a new cause of action; its purpose was to make the declaration conform to the proof.

It has been suggested by the plaintiff that Rothschild, by evidence offered on his behalf, brought into the case the fact that gasoline flowing into a tank through a hose and nozzle so disturbed the gasoline as to cause gasoline vapors to escape through the intake into the surrounding atmosphere in such quantities as to cause an explosion if ignited, and that the question was then presented to the jury. This being the record, the defendant was not prejudiced or surprised by the filing of the amended declaration after the verdict.

Upon the question of proximate cause the facts seem to establish that if the flow of the gasoline into the tank or upon the floor created the condition that made the subsequent explosion possible and the act of Rothschild in throwing the flaming match - an independent act not to be anticipated - was the promimate cause of the injury, and the amendment of the declaration made the verdict responsive, then the filing of the amended declaration allowed by the trial court was not error.

We have examined the evidence in this case and are of the opinion that the verdict of the jury is amply supported by the facts and fully justified by the evidence.

Complaint is made by defendant Rothschild that the court in denying the right of counsel for the plaintiff to take the witness stand for the purpose of impeachment was in error. Our attention has been called to the record by the plaintiff, who points out that the defendant's attorney did not offer to take the

The facts, however, are for the jury, and they passed upon them and determined the issues upon this question. It does not seem to this court that the defendant was prejudiced. The declaration was filed in order to enable the plaintiff to recover on the action intended. The amended declaration did not state a new cause of action; its purpose was to make the declaration conform to the proof.

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Upon the question of proximate cause the facts sufficient to establish that if the flow of the gasoline into the tank or upon the floor created the condition that made the subsequent explosion possible and the act of Rothschild in throwing the flaming match - an independent act not to be anticipated - was the proximate cause of the injury, and the amendment of the declaration made the verdict responsive, then the filing of the amended declaration allowed by the trial court was not error.

We have examined the evidence in this case and are of the opinion that the verdict of the jury is amply supported by the facts and fully justified by the evidence.

Complaint is made by defendant Rothschild that the court in denying the right of counsel for the plaintiff to take the witness stand for the purpose of impeachment was in error. Our attention has been called to the record by the plaintiff, who points out that the defendant's attorney did not offer to take the

stand, and that no offer to prove any fact was made by the defendant. The offer to prove certain facts not having been made, the court will not be able to consider whether such facts were material and pertinent to the questions involved.

The remaining point to be considered by this court is the question of newly discovered evidence.

It appears from the affidavits of Meyer Rothschild and Helen Lowitz that Edgar Armstrong, a witness for the plaintiff, confessed that when testifying upon the trial he committed perjury. He intimated that he received no material gain for such testimony and that upon sufficient inducement he would make amends. From the affidavits it does not appear to just what facts Armstrong would testify if a new trial was granted, and the trial court therefore properly refused to grant a new trial upon the ground of this alleged newly discovered evidence.

This court has examined the affidavits, and no facts are stated from which it can be determined wherein the witness failed to testify truthfully.

There being no error which would justify a new trial, the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

ained, and that no effort to prove any fact was made by the defendant. The jury is prone certain facts and turning into such, the court will not be able to scrutiny matters such facts are material and pertinent to the questions involved.

The remaining point to be considered by this court is the question of newly discovered evidence.

It appears from the affidavits of Roger Hatchitts and Brian Joseph that Eight Innocent, a witness for the defendant, mentioned that when testifying were the trial he committed perjury. He intended that he received no material gain for such testimony and that upon additional inducements he would give answer. From the affidavits it does not appear to just what facts Atwoodson would testify if a new trial was granted, and the trial court therefore properly refused to grant a new trial upon the ground of this alleged newly discovered evidence.

This court has examined the affidavits, and no facts are stated from which it can be determined whether the witness failed to testify truthfully.

There being no error which would justify a new trial, the judgment is affirmed.

INCORRECT JUDGMENT.

Will, P.J. and Hinkel, J. concur.

36348

SHERIDAN F. BETES,

Appellee,

v.

ROBERT HALLOMAN, et al.,
On Appeal of Clifford O. Stark,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

272 I.A. 610

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Clifford O. Stark from a $600 judgment entered by the court upon a verdict of the jury in favor of the plaintiff and against the defendant in an action for damages based upon the alleged negligence of the defendant.

This accident occurred on the 26th day of January, 1931, about the hour of seven o'clock A. M. The plaintiff was employed as a foreman; had been at work during the night of October 26, 1931, and at the time of the accident was on his way home, driving a Ford Automobile Sedan, accompanied by Gilbert Mainwaring.

The plaintiff was driving north on Rhodes Avenue, and as he neared the intersection of 65th Street and Rhodes Avenue, traveling about 20 miles an hour, he slowed down as he neared the intersection, looked east and west and when about eight or ten feet south of 65th Street he saw a Stutz roadster approaching about 30 feet west of Rhodes Avenue at a speed of about 28 miles an hour, and it was at this intersection that the cars collided and the plaintiff was injured.

The front of the Ford car driven by the plaintiff was damaged. The Stutz car was owned by Robert Halloman, who was one of the defendants, and the car was driven for him by one David Leneer. This car was kept by Halloman at the American Giants Garage, of which defendant Stark was the owner. Leneer was employed in the garage by Stark as a night washer to clean cars stored by

No. 17271 A. 610

Cuyahoga Filed Oct. 21, 1935

BEFORE THE MINUTES

EXPRESS BOOK

JUDGE COURT.

BERNIAN V. BUTTS,

Appellee,

v.

ROBERT ELLISON, et al.,

Defendants-of-Error.

On Appeal of Clifford C. Stark,

Appellant.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Clifford C. Stark from a 1935 judgment entered by the court upon a verdict of the jury in favor of the plaintiff and against the defendant in an action for damages based upon the alleged negligence of the defendant.

This accident occurred on the 30th day of January, 1931, about the hour of seven o'clock A. M. The plaintiff was employed as a foreman; had been at work during the night of October 30, 1931, and at the time of the accident was on his way home, driving a Ford automobile sedan, accompanied by different passengers.

The plaintiff was driving north on Shaker Square and as he neared the intersection of 65th Street and Shaker Avenue, traveling about 20 miles an hour, he slowed down as he neared the intersection. Looked east and west and when about eight or ten feet south of 65th Street he saw a State roadster approaching about 30 feet west of Shaker Avenue at a speed of about 25 miles an hour, and it was at this intersection that the cars collided and the plaintiff was injured.

The front of the Ford car driven by the plaintiff was damaged. The State car was owned by Robert Ellison, who was one of the defendants, and the car was driven for him by one David Lanser. This car was kept by Ellison at the American Giants Garage, of which defendant Stark was the owner. Lanser was employed in the garage by Stark as a night washer to clean cars stored by

patrons of the garage. His hours of service were from 6 p.m. to 6 a. m.

There is evidence in the record that Halloman made arrangements with one Meredith, manager and superintendent of defendant Stark's garage, to have Halloman's car delivered to his home every morning between 7;30 and 8 o'clock by an employee of this garage; that the Stutz car on the day of the accident was being delivered to the home of Halloman by Leneer, one of the employees of defendant Stark.

Complaint is made by the defendant that the following instruction is erroneous:

> "The court instructs the jury that by right of way is meant that if two vehicles are approaching the same intersection at right angles, and if each vehicle continued at the same rate of speed and would meet at the intersection, then it is the duty of the driver of the vehicle approaching from the left of the other vehicle to slacken his speed and to allow the other vehicle to pass. And if if you further believe that at the place in question the driver of the plaintiff's automobile had the right of way, and that the defendant did not slacken his speed, and that the failure of the defendant to slacken his speed contributed to the accident, then you are to find the defendant guilty."

and the defendant contends that the instruction did not contain the necessary element of law that the plaintiff at the time of the accident was in the exercise of due care and caution for his own safety, so as to eliminate the question of the plaintiff's contributory negligence, if any.

Where an instruction is subject to criticism because of its omission to inform the jury as to the law governing the question under consideration by the jury, and there are other instructions given on behalf of the same party which supply such deficiency so that the jury is not misled as to the law, the rule is that the objection to the first instruction is obviated and cured. This rule does not apply in a personal injury case if an

partner of the garage. His hours of service were from 8 p.m. to 8 a.m.

There is evidence in the record that Mallonee made arrangements with one Meredith, manager and superintendent of defendant State's garage, to have Mallonee's car delivered to his home every morning between 7:30 and 8 o'clock by an employee of this garage; that the truck car on the day of the accident was being delivered to the home of Mallonee by lessee, one of the employees of defendant State.

Complaint is made by the defendant that the following instruction is erroneous:

> "The court instructs the jury that by right of way is meant that if two vehicles are approaching the same intersection at right angles, and if such vehicle continued at the same rate of speed and would meet at the intersection, then it is the duty of the driver of the vehicle approaching from the left of the other vehicle to slacken his speed and to allow the other vehicle to pass. And if you further believe that at the place in question the driver of the plaintiff's automobile had the right of way, and that the defendant did not slacken his speed, and that the failure of the defendant to slacken his speed contributed to the accident, then you are to find the defendant guilty."

and the defendant contends that the instruction did not contain the necessary element of law that the plaintiff at the time of the accident was in the exercise of due care and caution for his own safety, so as to eliminate the question of the plaintiff's contributory negligence, if any.

Where an instruction is subject to criticism because of its omission to inform the jury as to the law governing the question under consideration by the jury, and there are other instructions given on behalf of the same party which supply such deficiency so that the jury is not misled as to the law, the rule is that the objection to the first instruction is obviated and cured. This rule does not apply in a personal injury case if an

instruction, amounting to a direction to the jury to find for the plaintiff if they believe the facts stated therein have been proved, omits the essential element of the plaintiff's care. Swierez v. Illinois Steel Co., 231 Ill. 456; Belskis v. Dering Coal Co. 146 Ill. App. 124.

The instruction objected to by the defendant in this case is erroneous in one of the important essentials of law, namely, that in instructing the jury to find the defendant guilty of the negligence charged in the declaration, the instruction fails to advise the jury that at the time and place of the accident it was necessary that the plaintiff be in the exercise of ordinary care and caution for his own safety. The jury no doubt was misled by this instruction from the fact that the court instructed the jury that if the plaintiff had the right-of-way and the defendant failed to slacken the speed of his car, he contributed to the accident and was guilty of the negligence charged, irrespective of the contributory negligence of the plaintiff, and that he, the defendant, would still be guilty. The omission from the instruction that the plaintiff must be in the exercise of ordinary care and caution for his own safety at the time of the accident is reversible error.

Other objections were made, and no doubt the court will give careful consideration to the contentions of the party objecting, but we do not deem it necessary to pass upon such objections at this time.

For the reasons stated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P. J. AND
WILSON, J. CONCUR.

instruction, amounting to a direction to the jury to find for the plaintiff if they believe the facts stated therein have been proved, omits the essential element of the plaintiff's care. Delaney v. Illinois Steel Co., 273 Ill. 456; Malkie v. Pullman Car Co. 166 Ill. App. 124.

The instruction objected to by the defendant in this case is erroneous in one of the important essentials of law, namely, that in instructing the jury to find the defendant guilty of the negligence charged in the declaration, the instruction fails to advise the jury that at the time and place of the accident it was necessary that the plaintiff be in the exercise of ordinary care and caution for his own safety. The jury no doubt was misled by this instruction from the fact that the court instructed the jury that if the plaintiff had the right-of-way and the defendant failed to slacken the speed of his car, he contributed to the accident and was guilty of the negligence charged, irrespective of the contributory negligence of the plaintiff, and that he, the defendant, would still be guilty. The omission from the instruction that the plaintiff must be in the exercise of ordinary care and caution for his own safety at the time of the accident is reversible error.

Other objections were made, and no doubt the court will give careful consideration to the contentions of the party objecting, but we do not deem it necessary to pass upon such objections at this time.

For the reasons stated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P. J. and
WILSON, J. concur.

36280

69

CHARLES R. HAMSLEY,
Appellee,

v.

CHARLES C. STANNARD and
ORA STANNARD,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

272 I.A. 610

Opinion filed Oct. 25, 1933

MR. JUSTICE MEBEL DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit instituted by the plaintiff against the defendants for the recovery of a commission for the sale of real estate. The declaration was filed on October 15, 1926, and consists of the common counts. The defendants filed a plea of the general issue, and on motion of the defendants it was ordered that the plaintiff file, and he did file, a bill of particulars. The cause was submitted to a jury, and a verdict was rendered finding the issues for the plaintiff and assessing the plaintiff's damages at $7,364.79, upon which a judgment was entered by the court for this amount, and from which the defendants appeal to this court.

The evidence introduced upon the issues is, substantially, that the plaintiff was a duly licensed real estate broker in the years 1924 and 1925; that he called at the home of the defendants, visited the real estate in question and talked with the defendants, who consented to the listing by him of the property that was for sale, and that thereafter the plaintiff talked to various representatives of the Public Service Company of Northern Illinois, and that he talked to Harry L. Judd, the manager of the Oak Park Branch of this Company, and to Norman J. Richards, in charge of the Construction and Engineering Department, also to F. E. Williams, successor to Mr. Richards; that the plaintiff was informed that arrangements had been made to appoint a committee to recommend a site for purchase by the Public Service Company of Northern Illinois; that the plaintiff

[illegible]

[illegible]

[illegible]

negotiated with the members of the committee for the purchase of the property by the Company.

On June 5, 1924, the plaintiff mailed a letter to the defendant Mrs. Ora Stannard, advising her that the plaintiff had submitted the farm, and that thereafter, he talked to Mrs. Stannard, and on March 30, 1925, the plaintiff wrote and mailed a letter to Mrs. Stannard, addressed to Miami, Florida, advising her that he was looking for a site for the Public Service Company of Northern Illinois, and that he had taken Mr. Richards and Mr. Williams to see the place. On or about April 18, 1925, the plaintiff talked with Mr. Judd and Mr. Williams and was informed that they were on a committee to recommend a site to their company; that Judd offered $75,000 for the land in question, which sum was refused, and later, he stated that he was authorized to offer $90,000. The contract was drawn and submitted to Mrs. Stannard on April 21, 1925, and Mrs. Stannard refused to sell at that price, but suggested that she would take $2500 an acre. There is evidence offered by the plaintiff that Mrs. Stannard would consider an offer of $100,000 for the property; that plaintiff talked with Mr. Judd, and that he, Judd, stated that his Company would not pay $100,000 for the property.

The evidence tends to show that the contract was entered into for the purchase of the farm in the name of the Standard Trust & Savings Bank, as trustee. The contract was dated May 23, 1925, and signed by the defendants, and thereafter the property was conveyed by the defendants to the Standard Trust & Savings Bank, as trustee, and by the trustee conveyed to Waldo F. Tobey, and by him to the Public Service Company of Northern Illinois. The contract price received by the defendants was $147,295.80, and the defendants denied any knowledge of the fact that the Public Service Company of Northern Illinois was the purchaser of the land.

negotiations with the owners of the countries for the purchase of the property by the Company.

On June 6, 1924, the plaintiff mailed a letter to the defendant Eva. The document, attaching her that the plaintiff had modified the form, and that therefore, he liked to use. Thereafter, and on March 20, 1925, the plaintiff wrote and mailed a letter to Eva. Plaintiff, addressed to Edmund, Illinois, advising her that he was looking for a site for the Public Service Company of Northern Illinois, and that he had taken an, Mr. Williams to see the place. On or about April 18, 1925, the plaintiff talked with Mr. Ludd and Mr. Williams and was informed that they were on a committee to recommend a site to their company; that Ludd offered $75,000 for the land in question, which was not returned, and later, he stated that he was authorized to offer $80,000. The property was drawn and mailed to Eva. Thereafter on April 21, 1925, and Eva, Thereafter refused to sell at that price, but suggested that she would take $100 an acre. There is evidence offered by the plaintiff that Eva, thereafter would consider an offer of $120,000 for the property; that plaintiff talked with Mr. Ludd, and that he, Ludd, stated that his company would not pay $120,000 for the property.

The evidence tends to show that the contract was entered into for the purchase of the farm in the name of the defendant Trust & Savings Bank, in trusts. The contract was dated May 22, 1925, and signed by the defendants, and therefore the property was conveyed by the defendants to the Standard Trust & Savings Bank, as trustee, and by the trustee conveyed to this X. Tony, and by him to the Public Service Company of Northern Illinois. The contract price received by the defendants was $147,000.00, and the defendants claim as consideration of the land that the Public Service Company of Northern Illinois was the purchaser of the land.

After the plaintiff submitted the property to this Company, his negotiations for a possible sale extended from June, 1924 until the latter part of May, 1925; and he had numerous interviews with the representatives of this Company and with the defendants.

It also appears from the evidence that Mrs. Stannard upon learning that the Company was considering the purchase of the property, called on Mr. Judd of this Company, and thereafter met him several times; that Judd obtained the services of F. A. Hill & Company to appraise the property for the Public Service Company of Northern Illinois, advising Hill, however, that the Company would probably take a part of the land, and then Hill actively negotiated with the defendants for the purchase of the property by Hill and Judd for subdivision purposes and with the intention of selling a part of the land so acquired to the Company represented by Judd. A price of $2700 an acre was obtained by Hill from Mrs. Stannard before a contract was entered into for the purchase of the property. It appears, however, that one A. L. Walker, who represented Hill & Company, was told by Britton I. Budd, the president of the Public Service Company of Northern Illinois, that the Company would purchase the entire tract.

The question is, did the trial court err in denying the defendants' motion for a new trial and in entering judgment upon the verdict, for the reason that the judgment was contrary to the manifest weight of the evidence. It is not disputed that plaintiff was employed to sell the defendants' property, and there is evidence that the plaintiff offered the defendants' real estate to the Public Service Company of Northern Illinois and that as a result of his efforts, a price of $90,000 was offered by the Company, which, however, was refused by the defendants. The vidence also tends to establish the fact that $2500 an acre would be acceptable to the defendants, and an offer of $100,000 for the entire tract would be considered by them. The defendants knew that the plaintiff was negotiating with an agent of this company as the defendants' representative, and the facts are that thereafter

Mrs. Stannard talked with Mr. Judd, who was representing the Company.

There is this unusual fact in the case, the contract, deeds and other necessary papers indicate that the land was purchased in the name of a third party who had no legal or financial interest in the purchase of the real estate.

All the facts were for the jury, together with the evidence that the defendants denied having any knowledge of the purchase of the land by the Public Service Company of Northern Illinois, and that the only knowledge they had of the name of the purchaser was that evidenced by the contracts and deeds, and the jury no doubt took into consideration the concealment from the plaintiff of this sale, both by Judd, who was representing the Company, and the defendants in the present action, until after the sale had been consummated.

From the evidence and under the circumstances it is for the jury to determine from the facts whether the plaintiff was the efficient procuring cause of the saleof the defendants' land to the Public Service Company of Northern Illinois. Having examined the evidence before us, we are satisfied that it fully justifies the verdict of the jury. Voellinger v. Kohl, 261 Ill. App. 271; Wright v. McClintock, 136 Ill. App. 436; Wilson v. Mason, 158 Ill. 304.

The defendants also contend that counsel for the plaintiff improperly interjected his own personal opinion in the argument when he stated to the jury:

> "I know Mr. Charles is too shrewd a lawyer, I have known him many years, and I believe Mrs. Stannard is protected in the matter of his commission by F. A. Hill & Company, and the real party in interest here is F. A. Hill & Company, and that F. A. Hill & Company, will refund that money."

While the defendants objected to the remarks, the record does not show that a ruling was made by the court. The defendants, over the objection of the plaintiff, off red in evidence an exhibit which indicated payment of the commissions by the defendants to F. A.

Mr. Stewart Lalmet with Mr. Lynch, who was interrupting his speech.

There is this unusual fact in the case, the contract, deeds and other necessary papers indicate that the land was purchased in the name of a third party who had no legal or financial interest in the purchase of the real estate.

All the facts make the jury, together with the evidence that the defendants called having any knowledge of the purchase of the land by the Public Service Company of Southern Illinois, and that the only knowledge they had of the name of the purchaser was that acquired by the contracts and deeds, and the jury on doubt took into consideration the concealment from the plaintiff of this sale, both by fraud, the use intermediate the company, and the defendants in the present action, until after the suit had been commenced.

Then the evidence was under the instructions it is for the jury to determine from the facts whether the plaintiff was the rightful purchaser owner of the subject the defendants' land to the Public Service Company of Southern Illinois. Having considered the evidence before us, we are satisfied that it fully justifies the verdict of the jury. Indiana v. Ross, 281 Ill. App. 171; Taylor v. Mitchell, 216 Ill. App. 498; Illman v. Lyman, 148 Ill. 504.

The defendants also argued that Deacon for the plaintiff improperly injected his own personal opinion in the argument when he stated to the jury:

> "I have to, Charles is the owner : lawyer, I live like his many years, and I believe too. Lawyer is protecting in the matter of his examination by F. A. Hill & Company, and the real party in interest here is A. A. Hill & Company, and that F. A. Hill & Company, will refund that money."

While the defendants objected to the remarks, the record does not show that a ruling was made by the court. The defendants, over the objection of the plaintiff, offered in evidence an exhibit which included letters of the communications by the defendants to F. A.

Hill & Company for the sale of this land. The evident purpose was to show that the defendants paid a commission for the sale. This, of course, did not deprive the plaintiff of his right to maintain an action for the work which produced a purchaser and which was the procuring cause of the sale. The argument of plaintiff's counsel, while not approved, was not such as to be reversible error, nor such as would justify this court in ordering a retrial. The judgment for the plaintiff is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

Bill a monopoly for the sale of their land. The British Parliament was to make that the determinate until a remonstrance the 1st note. This, of course, did not destroy the identity of the right to maintain an action for the wrongs done prohibited a jurisdiction not which was the jurisdiction above alleged. The judgment of plaintiff's counsel, while not reversed, can not stand as to the territorial right, but must be held purely this should be considered material. The judgment for the plaintiff is affirmed.

ADDRESS-LITIGATION.

BRIEF. I.I. AND ITALICS, A. DOUGLAS.

36302

NATHAN GUMBINSKY, Appellant, v. MOE ROSENBERG, Appellee.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

70 H

272 I.A. 610

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the plaintiff in an action in trover to recover from the defendant the value of 1,000 shares of the common stock of the Daniel Boone Woolen Mill, Inc.

The substance of the evidence is that the plaintiff was an officer and active in the operation of the General Fiber Co., and that the defendant was a co-partner in the business known as the Rosenberg Iron & Metal Co.; that on July 31, 1924, the plaintiff, at the request of the defendant, loaned to him 1,000 shares of the stock of the Daniel Boone Woolen Mills, Inc. owned by the plaintiff, and upon his order the plaintiff's broker delivered 1,000 shares of this stock to the defendant, for which the defendant executed two written receipts, which were delivered to the plaintiff and his broker upon the delivery of the stock in question.

There is evidence offered by the plaintiff that the shares of stock were loaned to the defendant and were to be returned to the plaintiff within a period of ten days. This stock was used to protect the defendant's margin account with his broker. Demand was made upon the defendant for the return of this stock to the plaintiff, and finally, on October 9, 1924, the plaintiff made a written demand upon the defendant for the return of this stock.

The defendant admits the receipt of the stock, as well as the written demand, and that the stock in question was not returned to the plaintiff.

[illegible]

[illegible] Appellant,

v.

[illegible] Appellee.

[illegible]

[illegible]

[illegible]

It was stipulated of record that the market value of this stock at the time of the delivery on July 31, 1924, and at the time of the written demand, was $11.00 per share. The defendant denied that he said to the plaintiff, "If I cannot return the stock within a week I will return it within ten days."

At the conclusion of the hearing, the jury returned this verdict: "We, the jury, find the defendant not guilty of wrongful conversion, but find he owes for stock loaned." The court upon this verdict entered the judgment appealed from.

The issue in this case is: Did the defendant wrongfully convert to his own use the 1,000 shares of the common stock of the Daniel Boone Woolen Mills, Inc. loaned to him by the plaintiff to be returned in ten days, or was the stock delivered to the defendant by the plaintiff to be used by him to margin his account with the stock broker?

This, of course, was a question of fact to be passed upon by the jury, and we would not be disposed to disturb the verdict unless the court erred to the extent that the ruling by the court during the trial was of such character as to be reversible. The error therefore must be such that a duty or burden was imposed upon one of the parties, or the denial of a right whether by the admission of evidence or the giving of instructions that would violate a rule of law.

The trial court permitted the case to be considered by the jury upon the facts, and it is not our province to determine, as a matter of law, that from the evidence the stock was not converted by the defendant. Upon the question of facts to be considered by the jury, it is important that the jury be properly instructed by the court. It is contended by the plaintiff that the given instruction offered by the defendant is erroneous. This instruction is as follows:

It was stipulated at counsel that the market price of this stock at the time of the delivery on July 22, 1924, and at the time of the writing hereof, was $21.00 per share. The defendant denies that he sold to the plaintiff, "If I cannot return the stock within a week I will return it within ten days."

At the conclusion of the hearing, the jury returned this verdict: "We, the jury, find the defendant not guilty of wrongful conversion, but find he owes for stock loaned." The court upon this verdict entered the judgment appealed from.

The issue in this case is: Did the defendant wrongfully convert to his own use the 1,000 shares of the common stock of the Shield Boone Motor Sales, Inc. loaned to him by the plaintiff to be returned in ten days, or was the stock delivered to the defendant by the plaintiff to be used by him to assist his company with the stock market?

This, of course, was a question of fact to be resolved upon by the jury, but we would not be disposed to disturb the verdict unless the court erred to the extent that the ruling by the court during the trial was of such character as to be reversible. The error therefor must be such that a duty or burden was imposed upon one of the parties, or the denial of a right whether by the admission of evidence or the giving of instructions that would violate a rule of law.

The trial court permitted the case to be considered by the jury upon the facts, and it is not our province to determine, as a matter of law, just from the evidence the stock was not converted by the defendant. Upon the question of facts to be considered by the jury, it is important that the jury be properly instructed by the court. It is contended by the plaintiff that the given instructions allowed to the defendant is erroneous. The instruction is as follows:

> "The Court instructs the jury that the burden of proof in this case is upon the plaintiff, and this rule as to the burden of proof is binding in law and must govern the jury in deciding this case. The jury have no right to disregard this rule, or adopt any other rule in lieu thereof, but in weighing the evidence and coming to a verdict they should carefully apply and follow said rule, and if by that rule the plaintiff has failed to establish his case, as set forth in the declaration against the defendant, it is the duty of the jury to find the defendant not guilty."

The complaint is that the court instructed the jury that if "The plaintiff has failed to establish his case as set forth in the declaration against the defendant" the jury is required to find the defendant not guilty, and in support of this contention the case of Hurzon v. Schmitz, 262 Ill. App. 537, is cited, which does sustain the position of the plaintiff, and the court in its opinion said:

> "The instruction is erroneous for another reason. It informed the jury that the plaintiff in order to recover must establish certain facts. In a civil case a plaintiff is entitled to recover if the evidence creates probabilities in his favor, - that is, that the weight of the evidence inclines to his side. Grabtree v. Reed, 50 Ill. 306. A plaintiff is not required to establish any elements essential to a recovery. McMasters v. Grand Trunk Ry. Co. 155 Ill. App. 648. The word 'establish' ordinarily means to settle finally, to fix unalterably. It is not necessary in a civil action that any fact should be established - that is, settled certainly, or fixed permanently- which may have been uncertain, doubtful or disputed before. * * *The instruction placed a higher burden upon appellant than the law required. It was very much like telling the jury that appellant was required to prove the facts stated to the satisfaction of the jury or beyond a reasonable doubt. Instructions requiring a plaintiff to prove his case by a clear preponderance of the evidence, to produce evidence to satisfy the jury, or to prove certain facts to the satisfaction of the jury, have been frequently condemned."

There is another reason why the instruction is erroneous, not alone that the plaintiff is required to establish his case, but also that he is required to establish his case as set forth in the declaration. Instructions of like import have been condemned where there is no instruction by the court informing the jury of the allegations contained in the declaration. Under this instruction the jury was to determine what was alleged in the declaration and was not informed by the court what the issues are in the present case. Therefore, the instruction is uncertain and it leaves the jury to

"The Court instructs the jury that the burden of proof in this case is upon the plaintiff, and this rule is a rule of law to be applied in the end upon the whole case. The jury are bound to follow the law as it is given them by the court. The jury have no right to disregard this rule, or adopt any other rule in lieu thereof, but is obliged to consider the evidence and decide, if possible, by whatever preponderance and value that may be, if it be such as to satisfy the plaintiff's claim to be entitled to the relief he seeks. In short, the jury are to weigh the evidence, in the discretion, in the manner and according to the rules of law, and if the plaintiff's claim be established, it is the duty of the jury to find for the defendant not guilty."

The complaint in that the court instructed the jury that if the plaintiff had failed to establish his claim on his proof in the affirmative regard the defendant' the jury is required to find the defendant not guilty, and in support of this contention the case of Burton v. Johnson, 181 Ill. App. 322, is cited, which does contain the problem of the plaintiff, and the court in its opinion said:

"The instruction is erroneous for another reason. It assumes the jury that the plaintiff is under no obligation to establish his claim. In a civil case a plaintiff is entitled to recover if the evidence produced establishes his right, — that is, when the weight of the evidence inclines in his side. Burton v. Johnson, 181 Ill. 322. A plaintiff is not required to establish his claim beyond a reasonable doubt in a civil action. Bonnette v. Wood Tribe, 76 Ill. App. 180. The word 'satisfied' properly means to satisfy fully, to the reasonable. It is not necessary in a civil action that any fact should be established — that is, established certainly, or fixed unmistakably — that the jury were uncertain, doubtful or diffident about it. The instruction placed a higher burden upon plaintiff than the law imposes. It was very much like telling the jury that doubtful evidence be given the force given to the satisfaction of the jury or beyond a reasonable doubt. Instructions requiring a plaintiff to prove his case by a clear preponderance of the evidence, or greater evidence to satisfy the jury, or to prove certain facts to the satisfaction of the jury, have been frequently condemned."

There is another reason why the instruction is erroneous, not alone that the plaintiff is required to establish his case, but also that he is required to establish his case on all facts in the indictment. Instructions of this length have been frequent there is no instruction by the court informing the jury of the ultimate facts in the indictment. Under this instruction the jury was to determine what was alleged in the indictment and was not informed by the court that the issues are in the pleadings. Therefore, the instruction is unwarrantable and it leaves the jury to

speculate upon the allegations of the declaration. The court in the case of Laughlin v. Hopkinson, 292 Ill. 80, pertinently makes this objection to the instruction which is applicable in the instant case and says:

> "It is urged that the court erred in giving to the jury plaintiff's second and sixth instruction, in which the jury were told, in substance, that if the defendant made the representations alleged in the declaration * * * then the verdict should be for the plaintiff. The objection is that the jury were left to determine, first, what representations were alleged in the declaration; and, second, what representations so alleged were material. The instructions are subject to the criticism made. What were the material allegations of the declaration was a question of law, and it was error to submit that question to the jury. The proper method is for the court to inform the jury by the instructions, in a clear and concise manner as to what material facts must be found to authorize a recovery. Where the jury are not only referred to the declaration to determine the issues, but are instructed to find a verdict for the plaintiff if the material allegations of the declaration are proved, they are to decide, as a matter of law, what are the material allegations, and might conclude that some allegation essential and material in law, was not material or necessary to be proved to justify a recovery."

The plaintiff also complains that the court erred in refusing an instruction offered by the plaintiff, which instruction was to the effect that if they believed the facts set up in the instructions they should find the defendant guilty. We have examined the offered instruction and are of the opinion that the instruction assumes facts which should be determined by the jury, and in our opinion the trial court properly refused the offered instruction.

There are other objections to the given, as well as to the refused instructions, and some of the errors complained of could have been cured by the plaintiff offering proper instructions upon his theory of the case.

In our opinion it is necessary that the case be retried, and it is not for this court to express an opinion upon the facts, except so far as it is necessary to pass upon the objections made by the parties.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

speculate upon the alleged[illegible] of the defendants. The court is the case of Jackson v. Commonwealth, 100 Ill. 90, particularly where the objection to the instruction which is complained in the instant case and says:

> "It is urged that the court erred in giving to the jury instructions, based not alone upon authorities, in which the jury were told, in substance, that if the defendant made the representations alleged in the declaration "I" the case the market would be the quantity. The objection is that the jury were left to speculate, first, what representations were alleged in the declaration and, second, what representations so alleged were material. The instructions are subject to the criticism made. That some the material allegations of the indictment was a question of law, and it was error to submit that question to the jury. The judge should, in the first place, have decided the question of the instructions, in a clear and concise manner so that jurors could not be misled in reference to the material facts. Here the jury are not only informed as to the evidence to establish the charge, but the instructions in fact a matter for the consideration of the general allegations of the declaration are general. They are so broad, as a matter of law, that any the material allegations, and which could not have been illegitimate accordingly that material in law, the not material in question, or is proved to prove a fraudulent."

The plaintiff also complains that the court erred in refusing to instruction offered by the plaintiff, which instruction was to the effect that if they believed the facts set up in the instructions they should find the defendant guilty. We have examined the offered instruction and are of the opinion that the instruction assumes facts which should be determined by the jury, and in our opinion the trial court properly refused the offered instruction.

There are other objections to the given, as well as to the refused instructions, but none of the errors complained of could have been cured by the plaintiff offering proper instructions upon his theory of the case.

In our opinion it is necessary that the case be retried, and it is not for this court to express an opinion upon the facts, except so far as it is necessary to pass upon the objections made by the parties.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Mill, J.A., not sitting, J. Shaw.

36311

LILLIAN BEAR, Appellant, v. GODFREY COHN and WILLIAM D. MEYERING, Sheriff, Appellee.	APPEAL FROM COUNTY COURT COOK COUNTY.

272 I.A. 610

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action upon the claim to the right of property brought by Lillian Bear, the petitioner, against the Sheriff of Cook County and Godfrey Cohn, defendants, to determine the title to an automobile. The case was tried before the court and a jury, and at the conclusion of the hearing the jury found the right of property in the defendants, and judgment was entered upon the verdict. From this judgment the petitioner appeals.

From the evidence it appears that on March 26, 1931, Godfrey Cohn recovered a judgment for $5,118.75 in the Superior Court of Cook County against one Alvin L. Bear; that Lillian Bear, the petitioner, is the wife of Alvin Bear, the judgment debtor; that on October 8, 1931, an execution was issued out of the Superior Court on the judgment against Alvin Bear and delivered to the Sheriff of Cook County; that at that time the automobile in question was the property of Alvin Bear, and was not delivered to the sheriff to apply in part upon the judgment.

On December 8, 1931, the sheriff sold certain real estate, the title to which was in Alvin Bear, and the proceeds of said sale, amounting to $3,421.65 were applied on the judgment, leaving a balance of $1,697.10 still due on the judgment. The time within which the execution could be levied expired on January 8, 1932.

Opinion filed Oct. 25, 1933

MR. JUSTICE ALBERT SMITH DELIVERS THE OPINION OF THE COURT:

This is an action upon the claim to the right of property brought by Lillian Beer, the petitioner, against the Sheriff of Cook County and Sheriff Cohen, defendants, to determine the title to an automobile. The case was tried before the court and a jury, and at the beginning of the hearing the jury found the right of property in the defendant, and judgment was entered upon the verdict. From this judgment the petitioner appeals.

From the evidence it appears that on March 26, 1931, Sidney Cohen recovered a judgment for $5,112.75 in the Superior Court of Cook County against one Alvin L. Beer; that Lillian Beer, the petitioner, is the wife of Alvin Beer; the judgment debtor; that on October 8, 1931, an execution was issued out of the Superior Court on the judgment against Alvin Beer and delivered to the Sheriff of Cook County; that at that time the automobile in question was the property of Alvin Beer, and was not delivered to the Sheriff to apply in part upon the judgment.

On December 8, 1931, the Sheriff sold certain real estate, the title to which was in Alvin Beer, and the proceeds of said sale, amounting to $4,421.00 were applied on the judgment, leaving a balance of $1,887.10 still due on the judgment. The time within which the execution could be levied expired on January 8, 1932.

From the evidence it appears that on January 5, 1932, Alvin Bear gave his wife, the petitioner, $2,000 in cash; that on January 15, 1932, the petitioner purported to purchase the automobile from her husband for $1,500, and the purchase was evidenced by a bill of sale, duly acknowledged before the Clerk of the Municipal Court of Chicago, and thereafter recorded, and that the petitioner procured and paid for the city and the state license for the automobile; that on March 15, 1932, this automobile was levied upon by the sheriff of Cook County by virtue of an alias execution issued upon the judgment hereinabove referred to; that the car was a Packard Seven Passenger Sedan purchased by Mr. Bear in December, 1930, and stored in the Flamingo Garage, when it was seized by the sheriff upon the execution.

The only witness was the petitioner herself, Lillian Bear who testified to establish the facts alleged in her petition, and from her testimony it appears that the claimant was a school teacher, and after her marriage to Alvin Bear she continued to teach; that she is now living with her husband at the Chicago Beach Hotel; that she is the owner of securities; that she paid various sums for hotel expenses; and that at five different times since her marriage she had received from her husband $3,175, including the $2,000 received on January 5, 1932.

It also appears from the testimony of the petitioner that she used the $2,000 received from her husband on January 5, 1932, to pay $500 to the Chicago Beach Hotel, and to make a loan to her husband of $500; that on January 5, 1932, she paid $1,000 to her husband on account of the purchase of the automobile, and cancelled the loan of $500 to him.

From her evidence it appears that the claimant did not pay any of the expenses for the upkeep of this car, and the car was used largely by her and her husband; and that no change was made

From the evidence it appears that on January 5, 1922, Alvin Dent gave his wife, the petitioner, $2,000 in cash; that on January 12, 1922, the petitioner purchased to procure the automobile from her husband for $1,500, and the purchase was evidenced by a bill of sale, duly acknowledged before the Clerk of the Municipal Court of Chicago, and thereafter recorded, and that the petitioner procured and paid for the city and the state license for the automobile; that on March 13, 1922, this automobile was levied upon by the sheriff of Cook County by virtue of an alias execution issued upon the judgment hereinabove referred to; that the car was taken from the garage being occupied by Mr. Dent in Jacksonville, and stored in the Flamingo Garage, when it was seized by the sheriff upon the execution.

The only witness was the petitioner herself. William Dent who testified to establish the facts alleged in her petition, and from her testimony it appears that the claimant was a school teacher, and after her marriage to Alvin Dent she continued to teach; that she is now living with her husband at the Chicago Beach Hotel; that she is the owner of securities; that she paid various sums for hotel expenses; and that at five different times since her marriage she had received from her husband $2,175, including the $2,000 received on January 5, 1922.

It also appears from the testimony of the petitioner that she used the $2,000 received from her husband on January 5, 1922, to pay $300 to the Chicago Beach Hotel, and to make a loan to her husband of $800; that on January 5, 1922, she paid $1,500 to her husband on account of the purchase of the automobile, and cancelled the loan of $800 to him.

From her evidence it appears that the claimant did not pay any of the expenses for the upkeep of this car, and the car was used largely by her and her husband; and that no change was made

in the use of the car after the purchase by the claimant.

The evidence in the record is somewhat strange as to the payment of the $2,000 by Alvin Bear to his wife, the claimant, and the use made of this money. First, it appears that $500 was paid to the hotel; secondly, that a loan of $500 was made immediately to Alvin Bear by his wife, which is not properly explained, and finally, that the automobile in question was purchased ten days after the receipt of the money, and the claimant paid her husband the balance of $1,000, and cancelled the $500 loan, $1500 being the purchase price of the automobile. The good faith of this transaction was for the jury to determine from the evidence and the circumstances appearing in the case.

Another fact to be considered by the jury is that the execution was based upon a judgment entered in the Superior Court of Cook County against Alvin Bear, of which the claimant had knowledge at the time of the transaction.

The Supreme Court in the case of Clark v. Harper, 215 Ill. 24, pertinently made this comment upon a transaction made for the purpose of defeating claims of creditors:

> "In Beach v. Miller, 130 Ill. 162, we held that, where the good faith of a sale of property is attacked, it is always competent to prove that the vendor was embarrassed or insolvent. Where a grantor makes a conveyance for the purpose of defeating the claims of his creditors, and the grantee, even though some consideration passed between the grantor and the grantee, knowingly assists in effectuating the fraudulent intent, or even had notice of such fraudulent intent, such grantee will be regarded as a participator in the fraud. 'The law never allows one man to assist in cheating another.' Beidler v. Crane, 135 Ill. 92; Bear v. Bear, 145 id. 21). While the relationship, which existed between Wallace and the appellant, is not in itself proof of fraud, yet it is a circumstance to excite suspicion; and where a conveyance is made by an insolvent debtor, if a near relationship exists between the grantor and grantee, more vigilant and jealous scrutiny will be excited, and clearer and more convincing proof will be required than when the transaction is between strangers. (Wightman v. Hart, 37 Ill. 123; Robinson Bank v. Miller, 153 id. 244; Martin v. Duncan, 156 id. 274; Lehman v. Greenhut, 88 Ala. 478)."

in the sale of the car after the transfer by the claimant.

The evidence in the record is somewhat strange as to the payment of the $2,000 by Alvin Dorr to his wife, the claimant, and the use made of this money. Itself, it appears that $500 was paid in the total; secondly, that a loan of $800 was made immediately to Alvin Dorr by his wife, which is not properly explained, and finally, that the automobile in question was purchased ten days after the receipt of the money, and the claimant paid her husband the balance of $1,000, and assumed the $800 loan, $1500 being the purchase price of the automobile. The jury trick of this transaction was for the jury to determine from the evidence and the circumstances surrounding in the case.

Another fact to be considered by the jury is that the execution was based upon a judgment entered in the Superior Court of Cook County against Alvin Dorr, of which the claimant had knowledge at the time of the transaction.

The Supreme Court in the case of Ditt v. Dorner, 216 Ill. 94, particularly made this comment upon a transaction made for the purpose of defeating claims of creditors:

> "In Good v. Allen, 180 Ill. 180, we said that, where the good faith of a sale of property is established, it is simply sufficient to prove that the vendor was embarrassed or insolvent. There is greater weight and consequence for the purpose of defeating the claims of his creditors, and the grantee, even though some consideration passed between the grantor and the grantee, knowingly assists in misdoing the fraudulent intent, or even has notice of such fraudulent intent, such grantee will be regarded as a participator in the fraud. The law never allows one who is seeking to obstruct creditors, or cause, 180 Ill. 90, Dorr v. Dorr, 1 Ill. 111. Since the relationship, which existed between Alvin and the appellant, is not in direct proof of fraud, yet it is a circumstance to which consideration and weight a correspondence is made by an insolvent debtor. If a mere relationship exists between the grantor and grantee, more slightly and jealous scrutiny will be exercised, and clearer and more convincing proof will be required than with the transaction is between strangers. (Lehman v. Kirk, 37 Ill. 137; Robinson Dock v. Allier, 116 id. 444; Ingels v. Dunne, 126 id. 374; Lehman v. Stevens, 92 Ill. 478)."

A case will not be reversed by the AppellateCourt where there is evidence in the record sustaining the verdict of the jury. In order that a judgment may be questioned by this court, it is necessary that the verdict and judgment therein be against the manifest weight of the evidence. We have examined the evidence in this case and are of the opinion that it fully sustains the judgment based upon the verdict of the jury.

The petitioner makes complaint that the court erred in admitting incompetent evidence offered by the defendants. The evidence complained of is that a witness was allowed to testify that Mr. Bear changed the name of the account at the garage where the car was stored from his name to that of H. H. Comstock. However, upon examination, it does not appear that objection was made by the petitioner at the time the evidence was offered, in compliance with the rule that an objection cannot be made and considered by this court for the first time.

It is also contended that evidence of the value of the automobile was admitted by the court. The objection is, that the witness testified as to the value from a certain book not offered in evidence, and that he did not testify from his personal knowledge as to the condition of the car. There is evidence in the record, however, by a witness as to the condition of the car, although it may be that the evidence as to value was not altogether material, but from the facts as they appear it was not reversible error to admit such evidence.

We have reached the conclusion that upon the record as it is, there is no such manifest error as to require a reversal, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

A case will not be reversed by the appellate court where there is evidence in the record sustaining the verdict of the jury. In order that a judgment may be overturned by this court, it is necessary that the verdict and judgment thereon be against the manifest weight of the evidence. We have examined the evidence in this case and are of the opinion that it fully sustains the judgment based upon the verdict of the jury.

The petitioner makes complaint that the court erred in admitting incompetent evidence offered by the defendants. The evidence complained of is that a witness was allowed to testify that Mr. Hoar changed the name of the account at the garage where the car was stored from his name to that of E. R. Swanson. However, upon consideration, it does not appear that objection was made by the petitioner at the time the evidence was offered, in compliance with the rule that an objection cannot be made and considered by this court for the first time.

It is also contended that evidence of the value of the automobile was admitted by the court. The objection is, that the witness testified as to the value from a certain book not offered in evidence, and that he did not testify from his personal knowledge as to the condition of the car. There is evidence in the record, however, by a witness as to the condition of the car, although it may be that the evidence as to value was not altogether satisfactory, but from the facts as they appear it was not prejudicial error to admit such evidence.

We have reached the conclusion that upon the record as it is, there is no such manifest error as to require a reversal, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

DAVIS, C.J., and WILSON, J., concur.

38320

JEANETTE MITCHELL, Appellant, v. PETER BARKULES, Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

72

272 I.A. 611

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This case is here on an appeal by the plaintiff from the judgment entered for the defendant in an action of replevin in the Municipal Court of Chicago. The cause came on for trial before the court without a jury, and from the judgment order it appears that the court found the right to possession of the property described to be in the defendant. The court further ordered that a writ of Retorno Habendo issue for delivery of said property to the defendant, and that costs be paid by the plaintiff.

The plaintiff filed an affidavit for replevin, setting forth that she is the owner and is now lawfully entitled to the possession of the goods and chattels described, and that they are of the value of $1,000.

This is an action of the fourth class, and no pleadings are required to be filed by the defendant.

The evidence, in substance, is that on September 6, 1929, Peter Antoinette, as mortgagor, executed a chattel mortgage to the plaintiff as mortgagee, conveying the chattels therein described, to secure the payment of 25 principal promissory notes, each in the principal sum of $200, the first of which matured on October 6, 1929, and the succeeding notes on the first of each month thereafter; that the chattel mortgage, together with fifteen notes remaining unpaid, was introduced in evidence by the plaintiff.

It further appears in evidence that the mortgagor, Peter Antoinette, is the father of the plaintiff; that the consider-

[illegible]

[illegible]

[illegible]

ation for the chattel mortgage was $5,000; that $3,000 was loaned by the plaintiff to Antoinette, and $2,000 was owing from Antoinette to the plaintiff for services as an employee in the restaurant owned by him; that the money was due for services rendered six or seven years before the date of the execution of the chattel mortgage.

There is contradiction in the testimony of Antoinette as to the amount due the plaintiff, and when the amount matured. The plaintiff's evidence as to the amount due for wages from her father is that it was $500, and that she loaned her father $3,000 in cash at the time the chattel mortgage was executed.

The evidence offered by the defendant is to the effect that the chattel mortgage was executed by Antoinette and delivered to the plaintiff, his daughter, and recorded, in order to defeat creditors.

There is evidence that the plaintiff was entitled to possession of the chattels and that the title to the goods was conveyed to her by the owner Antoinette. As between the mortgagor and the mortgagee, this chattel mortgage securing the payment of the notes in question is good, whether possession is retained by the mortgagor or not, and in so far as it affects the rights of the immediate parties, the chattel mortgage still remains a lien. However, by what means the defendant obtained possession of the described chattels is not clear nor satisfactory. There is no evidence in the record that possession of the chattels was obtained under levy and sale upon an execution issued on the judgment in favor of the defendant and against Antoinette, the mortgagor named in the chattel mortgage.

We have examined the record to determine upon what theory the defendant bases his claim to possession of the chattels as against the plaintiff, mortgagee, and we are unable to reach

which for the chattel mortgage was $4,000; that $2,000 was loaned by the plaintiff to Antoinette, and $2,000 was owing from Antoinette to the plaintiff for services as an employee in the restaurant owned by him; that the money was due for services rendered six or seven years before the date of the execution of the chattel mortgage.

There is contradiction in the testimony of Antoinette as to the amount due the plaintiff, and when the amount matured. The plaintiff's evidence as to the amount due for wages from her father is that it was $800, and that she loaned her father $2,000 in cash at the time the chattel mortgage was executed.

The evidence offered by the defendant is to the effect that the chattel mortgage was executed by Antoinette and delivered to the plaintiff, his daughter, and recorded, in order to defeat creditors.

There is evidence that the plaintiff was entitled to possession of the chattels and that the title to the goods was conveyed to her by the owner Antoinette. As between the mortgagor and the mortgagee, this chattel mortgage securing the payment of the notes in question is good, whether possession is retained by the mortgagor or not, and in so far as it affects the rights of the immediate parties, the chattel mortgage will remain a lien. However, by what means the defendant obtained possession of the described chattels is not clear nor satisfactory. There is no evidence in the record that possession of the chattels was obtained under levy and sale upon an execution issued on the judgment in favor of the defendant and against Antoinette, the mortgagor named in the chattel mortgage.

We have examined the record to determine upon what theory the defendant based his right to possession of the chattels as against the plaintiff, mortgagee, and we are unable to reach

the conclusion that the defendant was a creditor or a purchaser and as such, intervened after default in payment of the notes secured by the chattel mortgage and before possession was taken by the plaintiff.

Because of the unsatisfactory evidence, a new trial will be necessary. Accordingly the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND
CAUSE REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

the contention that the defendant was a consultor to a partnership and as such, interpleaded after Infold's injuries of the claims pressed by the storied mortgage and before possession was taken by the plaintiff.

Because of the unsatisfactory evidence, a new trial will be necessary. Accordingly the judgment is reversed and the cause remanded.

Attorney retained the
Cause remanded.

BAIL, P.J., AND KILGORE, J. CONCUR.

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36348

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., etc.,
Complainant,
v.
NORTHWESTERN TRUST & SAVINGS BANK,
Defendant,
On Appeal of
JULIUS FAFINSKI,
Appellant,
v.
DAVID E. SHANAHAN, Receiver of Northwestern Trust & Savings Bank,
Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

272 I.A. 611

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This matter came on for hearing in the Superior Court of Cook County upon the petition of Julius Fafinski and the answer of David E. Shanahan, receiver of the Northwestern Trust & Savings Bank. By the petition it was sought to impress a trust or secure a preference on the assets of the bank, and after consideration, the court entered an order denying the relief prayed for and finding that the $2,850 deposited by the petitioner was a general deposit. From this decretal order the petitioner appeals to this court.

From the petition it appears that the petitioner entered into a written agreement with the Northwestern Trust & Savings Bank on the 21st day of November, 1932, for the purchase of four $1,000 bonds issued on the Glenmore Apartments; that the money to apply in payment of these bonds was deposited with the bank for the special and express purpose of carrying out the terms of the written agreement; that a "special deposit" was created thereby, entitling the petitioner to a preferred claim to the amount of $2,850 so deposited; that the bonds of the Glenmore Apartments issue were in default for non-payment of interest due on March 15,

Opinion filed Oct. 26, 1933

MR. JUSTICE HENRY DISSENTING THE OPINION OF THE COURT.

This matter came on for hearing in the Superior Court of Cook County upon the petition of Julius Pollnerd and the answer of David E. Shanahan, receiver of the Northwestern Trust & Savings Bank. By the petition it was sought to impress a trust or secure a preference on the assets of the bank, and after consideration, the court entered an order denying the relief prayed for and finding that the $2,500 deposited by the petitioner was a general deposit. From this decretal order the petitioner appeals to this court.

From the petition it appears that the petitioner entered into a written agreement with the Northwestern Trust & Savings Bank on the 21st day of November, 1928, for the purchase of four $1,000 bonds issued on the Glenmore Apartments; that the money to apply in payment of these bonds was deposited with the bank for the special and express purpose of carrying out the terms of the written agreement; that a "special deposit" was created thereby, entitling the petitioner to a preferred claim to the amount of $2,500 so deposited; that the bonds of the Glenmore Apartments issue were in default for non-payment of interest due on March 15,

1931, and that foreclosure proceedings were pending during the time the Northwestern Trust & Savings Bank accepted these payments, aggregating $805, made by the petitioner; that the bank failed to notify the petitioner of these facts, and thereby the petitioner was deprived of the opportunity to withdraw the funds according to the terms of the contract; that the action of the bank and its officers constituted fraud upon the petitioner and that by such act a trust was impressed on the funds deposited with the bank by the petitioner.

The answer of the respondent is to the effect that the petitioner and the Northwestern Trust & Savings Bank entered into the written agreement for the purchase of the $4,000 bonds, and the respondent admits that $2,850 was paid by the petitioner; that the bonds were in default as alleged by the petitioner, and that foreclosure proceedings were instituted on said defaulted bonds, but the respondent denies that the petitioner is entitled to any priority or preference on said funds paid by the petitioner to the bank.

The petitioner contends that the payments made under the agreement for the purchase of the bonds are a special and not a general deposit, and therefore a preferred claim. In considering the question the court will apply the rule announced by the Supreme Court in the case of People ex rel v. Home State Bank of Grant Park, 338 Ill. 179, in these words:

> "Deposits in a bank may be either general or special. A general deposit is a deposit generally to the credit of the depositor, to be drawn upon by him in the usual course of the banking business. (Wetherell v. O'Brien, 140 Ill. 146; Otis v. Gross, 96 id. 612; Mutual Accident Ass'n. v. Jacobs, 141 id. 261; McGregor v. Battle, 128 Ga. 577; Alston v. State, 92 Ala. 124; Warren v. Nix, 97 Ark. 374.) A special deposit is a deposit for safe keeping, to be returned intact on demand, or for some specific purpose not contemplating a credit or general account. (Wetherell v. O'Brien, supra; Mutual Accident Ass'n. v. Jacobs, supra; Fogg v. Tyler 109 Me. 109; Anderson v. Pacific Bank, 112 Cal. 598; Clisby v. Martin, 150 Ala. 132.) A deposit in a bank is presumed to be a general deposit in the absence of an agreement to the contrary. Alston v. State, supra; Officer

1921, and that temporary proceedings were pending during the time the Northwestern Trust & Savings Bank accepted these payments, aggregating $[illegible], made by the petitioner; that the bank failed to notify the petitioner of these facts, and thereby the petitioner was deprived of the opportunity to withdraw the funds according to the terms of the contract; that the action of the bank and its officers constituted fraud upon the petitioner and that by such act a trust was impressed on the funds deposited with the bank by the petitioner.

The answer of the respondent is to the effect that the petitioner and the Northwestern Trust & Savings Bank entered into the written agreement for the purchase of the $4,000 bonds, and the respondent admits that $[illegible],000 was paid by the petitioner; that the bonds were in default as alleged by the petitioner, and that foreclosure proceedings were instituted on said defaulted bonds, but the respondent denies that the petitioner is entitled to any priority or preference on said funds paid by the petitioner to the bank.

The petitioner contends that the payments made under the agreement for the purchase of the bonds are a special and not a general deposit, and therefore a preferred claim. In considering the question the court will apply the rule announced by the Supreme Court in the case of People ex rel. v. State Bank of Great Bend, 293 Ill. 179, in these words:

> "Deposits in a bank may be either general or special. A general deposit is a simple payment to the credit of the depositor, to be drawn upon by him in the usual course of the banking business. (Bradwell v. O'Brien, 140 Ill. 148; Cole v. Jones, 94 Ill. 211; Mutual Indemnity Co. v. Hopkins, 141 Ill. 481; Sprague v. Smith, 138 Ill. 277; Slaton v. State, 88 Ill. 146; Brown v. Bin, 97 Ark. 274.) A special deposit is a transfer for safe keeping, to be returned intact on demand, or the same specific thing for manipulating a special or general purpose. (Bradwell v. O'Brien, supra; Mutual Indemnity Co. v. Hopkins, supra; Page v. Fidelity Ins. Co. 139; Dickson v. Pacific Bank, 112 Cal. 1; Ohio Valley v. Bowlin, 180 Ala. 182.) A deposit in a bank is presumed to be a general deposit in the absence of an agreement to the contrary. Cohen v. Stein, supra; Offices in Jurisdiction to be a general deposit in the absence of an

v. Officer, 120 Iowa, 389; Hawes v. Blackwell, 107 N. C. 196; Bank of Marysville v. Windischmuhlhauser Brewing Co. 50 Ohio St. 151." See also People ex rel v. Farmers State Bank of Grant Park, 338 Ill. 134.

From the terms of the contract in question it does not appear that the petitioner could draw upon the deposit for the purpose of checking against the funds in the usual course of the banking business. The amount deposited was in the nature of a special deposit for a specific purpose; that is, the purchase of four bonds, and upon the completion of the payments provided for in the contract, the bank agreed to deliver the bonds to the petitioner.

The deposit with the bank in the instant case was controlled by the agreement of the parties, and it never was within the contemplation of the parties that the money deposited by the petitioner was to be considered a general deposit. This is clearly indicated by the very nature of the contract. The payments required were to be made promptly when due, and when promptly paid on the due date, they were to bear interest at the rate of 6% per annum from the date of payment. In the event of failure by the petitioner to pay the amount when due, the bank could cancel the agreement and dispose of the bonds without notice, and return to the petitioner the amount paid in, without interest, upon the return of the agreement by the petitioner.

The respondent lays considerable stress upon the provision permitting the petitioner to withdraw at any time the amount paid in upon the surrender of the agreement, and the consequent loss of accrued interest, as indicating that the deposit was under the control of the depositor, and therefore the position of the petitioner was that of a general creditor.

Some comment is made by the respondent that the contract is signed only by the petitioner. The answer is that the

v. Gilmore, 120 Iowa, 398; Hayes v. McDonnell, 107 N. Y. 136; Ross of Boyertville v. Trachenbrodt Brewing Co., 61 Ohio St. 124. See also Jacobs et ux v. Barnes State Bank of Grand Island, 92 Ill. 124.

From the terms of the contract in question it does not appear that the petitioner could draw upon the deposit for the purpose of meeting various the checks in the usual course of the banking business. The account deposited was in the nature of a special deposit for a specific purpose; that is, the payment of these bonds, and upon the completion of the payments provided for in the contract, the bank agreed to deliver the bonds to the petitioner.

The deposit with the bank in the instant case was controlled by the agreement of the parties, and it never was within the contemplation of the parties that the money deposited by the petitioner was to be considered a general deposit. This is clearly indicated by the very nature of the contract. The payments required were to be made promptly when due, and when promptly paid on the due date, they were to bear interest at the rate of 6% per annum from the date of payment. In the event of failure by the petitioner to pay the amount when due, the bank could cancel the agreement and dispose of the bonds without notice, and return to the petitioner the amount paid in, without interest, upon the return of the agreement by the petitioner.

The respondent lays considerable stress upon the provision permitting the petitioner to withdraw at any time the amount paid in upon the surrender of the agreement, and the consequent loss of earned interest, as indicating that the deposit was under the control of the depositor, and therefore the position of the petitioner was that of a general creditor.

Some comment is made by the respondent that the contract is signed only by the petitioner. The answer is that the

parties considered the contract in full force and effect and the bank accepted the payments; in fact, the payments were endorsed on the contract itself by an authorized agent of the bank and received in accordance with the terms of the contract. This acceptance clearly indicates that the bank received the money for a special purpose; that is, the payment of the four bonds. Under the terms of the contract the petitioner had control of the deposit in that he could withdraw the funds at his option, but, in the opinion of the court, it was not such control as would make him a general creditor, for the reason that the payments received were to be held by the bank as a separate fund for a special purpose. The bank's authority to use the funds was for one purpose only, and that was to apply the amount received in payment of the bonds, and for this designated purpose only.

The other question before this court and which is called to our attention by the petitioner, namely, whether a general deposit not withdrawn from the bank by the depositor because of fraud and misrepresentation by the bank through its officer, impresses a trust on the funds, will not be considered because of the conclusion we have reached disposing of this appeal on other grounds.

For the reasons indicated the order appealed from is reversed and the cause remanded with directions that the lower court enter such order as may not be inconsistent with the views herein expressed.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HALL, P.J. AND WILSON, J. CONCUR.

petitioner considered the contracts in full force and effect and the bank accepted the payments; in fact, the payments were endorsed on the contract itself by an authorized agent of the bank and received in accordance with the terms of the contract. This acceptance clearly indicates that the bank received the money for a special purpose; that is, the payment of the first bonds. Under the terms of the contract the petitioner has control of the deposit in that he could withdraw the funds at his option, but, in the opinion of the court, it was not such control as would make him a general creditor, for the reason that the payments received were to be held by the bank as a separate fund for a special purpose. The bank's authority to use the funds was for one purpose only, and that was to apply the amount received in payment of the bonds, and for this designated purpose only.

The other question before this court and which is called to our attention by the petitioner, namely, whether a general deposit not withdrawn from the bank by the depositor because of fraud and misrepresentation by the bank through its officer, increases a fund in the funds, will not be considered because of the conclusion we have reached disposing of this appeal on other grounds.

For the reasons indicated the order appealed from is reversed and the cause remanded with directions that the lower court enter such order as may not be inconsistent with the views herein expressed.

MAIN, J.A. AND FLUHRER, J. CONCUR.

36357

MARY KRAFCISIN,

Appellant,

v.

WALTER E. HELLER & COMPANY, a Corporation, et al.,

Appellee.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

272 I.A. 611

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an action heard in the County Court as to the right of property to certain theatre equipment and box office receipts levied upon by the sheriff of Cook County, Illinois, by virtue of an execution issued out of the Circuit Court of Cook County upon a judgment in favor of Walter E. Heller & Company, a corporation, and against John Krafcisin and John Szanto.

The claimant in this proceeding, Mary Krafcisin, wife of John Krafcisin, asserts ownership of the chattels seized by the sheriff. At the conclusion of the hearing, the court found the issues and right to possession of the chattels in the defendant and entered judgment. From this judgment the claimant appeals.

It appears from the evidence that the equipment seized by the sheriff was located in the premises at 1933 West 51st Street, and known as the Cornell Square Theatre; that John Krafcisin, the husband of the claimant, signed two notes and a contract for theatre equipment; that one of the notes and a contract were signed for theatre equipment installed in the Cornell Square Theatre, and that this equipment was seized by the sheriff of Cook County upon an execution and is the subject of this controversy.

It also appears from the evidence that the other note and contract were signed for the theatre equipment installed in the premises at 526 East 47th Street, known as the Lucille Theatre. That contracts for the exhibition of motion pictures were also

Opinion filed Oct. 25, 1983

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an action heard in the County Court as to the right of property to certain theatre equipment and the office receipts levied upon by the sheriff of Cook County, Illinois, by virtue of an execution issued out of the Circuit Court of Cook County upon a judgment in favor of Walter E. Dalke & Company, a corporation, and against John Kazelnik and John Zemke.

The claimant in this proceeding, Mary Krefelnik, wife of John Krefelnik, asserts ownership of the chattels seized by the sheriff. At the conclusion of the hearing, the court found the issues and right to possession of the chattels in the defendant and entered judgment. From this judgment the claimant appeals.

It appears from the evidence that the equipment seized by the sheriff was located in the premises at 1820 West 51st Street, and known as the Council Square Theatre; that John Krefelnik, the husband of the claimant, signed two notes and a contract for theatre equipment; that one of the notes and a contract were signed for theatre equipment installed in the Council Square Theatre, and that this equipment was seized by the sheriff of Cook County upon an execution and is the subject of this controversy.

It also appears from the evidence that the other note and contract were signed for the theatre equipment installed in the premises at 6800 West 47th Street, known as the Lucille Theatre. That contracts for the exhibition of motion pictures were also

signed by John Krafcisin. This evidence is supported by exhibits 1 to 6 of March 1, 1932, and by exhibits 1 to 3, inclusive, of March 8, 1932.

The judgment upon the note for the installation of the theatre equipment in the Cornell Square Theatre was paid in full. The levy in the instant case was made to collect the judgment entered upon the note for the purchase of the Lucille Theatre equipment, and is the third levy made by the sheriff by virtue of a certain execution upon equipment contracted for by John Krafcisin.

Two previous demands and levies by the sheriff were released upon substantial payments having been made, and further, upon an agreement that the balance due was to be paid in installments, but upon failure to pay these installments by John Krafcisin, the third levy was made. By this proceeding the claimant asserts ownership of the theatre equipment, and that John Krafcisin, her husband, is employed by her as an agent in the conduct of the business.

This case was tried before the court, and we have the right to assume that the court considered only competent evidence in determining the issues between the parties.

It is evident that John Krafcisin negotiated and signed contracts for the theatre equipment and assumed the obligation to pay the amount called for by the execution of promissory notes. Judgment was entered in the Circuit Court of Cook County for the amount due upon the notes after default, and the plaintiff in that action is endeavoring to collect the amount of the judgment by the sheriff's levy.

The third levy was made by the sheriff of Cook County when for the first time the claimant, wife of the judgment debtor, asserted her right by this proceeding to the chattels in the possession of the sheriff, by virtue of the execution upon a

signed by John Kratzstein. This evidence is supported by exhibits 1 to 8 of March 1, 1922, and by exhibits 1 to 7, inclusive, of June 6, 1922.

The judgment upon the note for the installation of the theatre equipment in the Cornell Square Theatre was paid in full. The levy in the instant case was made to satisfy the judgment entered upon the note for the purchase of the Lucille Theatre equipment, and is the third levy made by the sheriff by virtue of a certain execution upon judgment entered for by John Kratzstein.

The previous demands and levies by the sheriff were released upon substantial payments being made, and further, upon an agreement that the balance due was to be paid in instalments, but upon failure to pay these instalments by John Kratzstein, the third levy was made. By this proceeding the claimant asserts ownership of the theatre equipment, and that John Kratzstein, her husband, is employed by her as an agent in the conduct of the business.

This case was tried before the court, and we have the right to assume that the court considered only competent evidence in determining the issues between the parties.

It is evident that John Kratzstein negotiated and signed contracts for the theatre equipment and assumed the obligation to pay the amount called for by the execution of promissory notes. Judgment was entered in the Circuit Court of Cook County for the amount due upon the notes after default, and the plaintiff in that action is endeavoring to collect the amount of the judgment by the sheriff's levy.

The third levy was made by the sheriff of Cook County upon for the first time the claimant, wife of the judgment debtor, asserted her right by this proceeding to the chattels in the possession of the sheriff, by virtue of the execution upon a

judgment issued in the Circuit Court of Cook County. It is strange that the claimant made no objection to the seizure of the chattels upon previous levies by the sheriff.

No doubt as an element in determining ownership, the court considered the fact that at the time John Krafcisin contracted for the theatre equipment which indicated ownership, this equipment was installed and in use in the theatre.

The question in this case is largely one of fact. The weight of the evidence and its sufficiency were passed upon by the court, and from its conclusion it did not agree with claimant's theory of ownership. There is evidence that amply sustains the judgment of the court, from which evidence it appears that the theatre equipment was purchased by John Krafcisin, and that he assume the obligation to pay. This equipment of the theatre was a necessity in the operation of a moving picture house, which, from the facts, raised the question of good faith as to the claimant's title.

There was a conflict in the evidence, and it was for the trial court to determine where the truth lay, and, upon the evidence in the record, pass judgment.

This court can only consider and determine from the evidence whether the judgment of the trial court is against the manifest weight of the evidence, and, as we have already indicated, it is our opinion that the judgment for the defendant is supported by the proof. We agree, in the main, with the law that is called to our attention as to the marital rights of husband and wife, and the right to separate ownership of property; that a husband or wife may engage in separate business enterprises, and employ in such business the husband or wife, as the case may be, and that such employment will not of itself subject the others property to debts

judgment issued in the divorce court of Cook County. It is strange that the claimant made no objection to the seizure of the chattels upon previous levies by the sheriff.

No doubt as an element in determining ownership, the court considered the fact that at the time John Karlstein contracted for the theatre equipment which indicated ownership, this equipment was installed and in use in the theatre.

The question in this case is largely one of fact. The weight of the evidence and its sufficiency were passed upon by the court, and from its conclusion it did not agree with claimant's theory of ownership. There is evidence that supply machine the judgment of the court, from which evidence it appears that the theatre equipment was purchased by John Karlstein, and that he assumed the obligation to pay. This equipment of the theatre was a necessity in the operation of a moving picture house, which, from the facts, raised the question of good faith as to the claimant's title.

There was a conflict in the evidence, and it was for the trial court to determine where the truth lay, and, upon the evidence in the record, pass judgment.

This court can only consider and determine from the evidence whether the judgment of the trial court is against the manifest weight of the evidence, and, as we have already indicated, it is our opinion that the judgment for the defendant is supported by the proof. We agree, in the main, with the law that is called to our attention as to the marital rights of husband and wife, and the right to separate ownership of property; that a husband or wife may engage in separate business enterprises, and employ in such business the husband or wife, as the case may be, and that such employment will not of itself subject the estate property to debts

which are due and owing by the employes, and that the transaction between husband and wife must always be in good faith and not carried on for the purpose of defeating the rights of creditors.

The defendant cited the case of Woolner for the use of WEST SIDE TRUST & SAVINGS BANK, a Corporation v. Big Woolner Co., a Corporation, General No. 36340, as an additional authority in the instant case. This opinion is to the effect that there was no evidence that the judgment debtor made any sale of the property. The sale of the property in question was made by his wife, who was not indebted to a creditor and the question of the Bulk Sales law has no application under such circumstances.

In this case the husband of Mary Krafcisin signed the contract and notes for the purchase of the moving picture machine and was in possession of the machine at the time the levy was made, and there is no evidence that the property was ever transferred to this defendant by her husband.

Under the facts the case of Woolner, et al v. Woolner Co. supra., does not apply.

The judgment being supported by the evidence and the law as applied to the facts, is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

36375

JOHN J. PINTA AND ANNA PINTA, Appellees, v. JOSEPH KRAL, ANTONETTE KRAL and ANNA ZITNEY, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

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272 I.A. 611

Opinion filed Oct. 25, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On October 14, 1931 a judgment by confession was entered in the Circuit Court of Cook County, Illinois, in favor of the plaintiffs and against the defendants for $2,182.50. On December 9, 1931, the defendants made a motion to vacate the judgment, which motion was continued, and on December 19, 1931, the court ordered that the judgment entered by confession be opened and the defendants' affidavits heretofore filed be permitted to stand as pleas to the declaration, and the judgment to stand as security.

On December 28, 1931, the plaintiffs filed a general demurrer to the pleas of the defendants, and on March 5, 1932, the court entered an order overruling the demurrer of the plaintiffs. The case then appeared on the jury calendar, and on April 14, 1932, the plaintiffs moved that the case be stricken from the jury calendar and placed on the non-jury calendar, which motion was allowed.

On April 14, 1932, the defendants filed a demand for a jury trial and paid to the Clerk of the Court jury fees of $8.00 as provided for by statute. On April 19, 1932, the defendants made a motion to have the cause restored to the jurycalendar, which motion was denied by the court on April 21, 1932, for the reason that no jury demand was made and the case inadvertently appeared on the jury calendar. A trial was then had before the court, and at the conclusion of the hearing the court found in favor of the plaintiffs and against the defendants, and the judgment entered on October 14, 1931,

against the defendants in the sum of $2, 182.50 was ordered to stand in full force and effect as of the date of the rendition of the judgment. Thereupon an appeal was taken by the defendants.

The judgment note for $2,000 upon which confession of judgment was entered, was dated September 4, 1931; was signed by all of the defendants, and made payable to the plaintiffs on demand, at the office of Hortsman, Linder, Felnar and Bernard, with interest at 6% after maturity, and provided for reasonable attorney's fees in the event confession of judgment was entered.

The Narr and cognovit was filed on October 14, 1931, by Hortsman, Linder, Felnar and Bernard, attorneys for the plaintiffs, upon the promissory note in question. The cognovit was signed by O. W. Hortsman ad defendants' attorney, and admits damages amounting to $2,182.50, which sum includes $182.50 allowed as reasonable attorney's fees. The affidavit attached to the narr was signed by John J. Finta, one of the plaintiffs, and sworn to before John B. Bernard as notary public.

On June 20, 1933, on motion of the defendants, leave was granted to file instanter a copy of the narr and cognovit and the judgment note attached, in lieu of the original narr and cognovit and judgment note filed on October 14, 1931, which had been lost. This order was O.K.'d. by the attorneys for the plaintiffs.

On July 16, 1932, an order was entered giving the defendants leave to file copies in lieu of the original pleadings which were filed and lost.

The affidavits of Anna Kitney and Antonette Kral, defendants, which were subscribed and sworn to and restored by copies thereof, are, in substance, that the note for $2,000, dated September 4, 1931, made payable to the order of the plaintiffs, and upon which judgment was entered, was signed by all of the defendants without consideration;

against the defendants in the sum of $9,180.00 was entered in favor in full force and effect as of the date of the execution of the judgment. Interest is accrued are taken by the defendants.

The judgment was for $1,000 upon each conversion of judgment was entered, and taken subsequent to 1957, was signed by all of the defendants, and [illegible] the liability on them, at the office of Dawson, Sadler, Fisher and Dawson, with interest at all after authority, and provided for reasonable attorney's fees in the event conversion of judgment was entered.

The Ward and Kopovitz was filed on October 14, 1957, by Maryann Ziolny, minor ten [illegible], attorneys for the plaintiff, [illegible] the attorney note in question. The complaint was signed by E. C. Dawson as defendants' attorney, and [illegible] [illegible] $9,180.00, which was involve $180.00 allowed as reasonable attorney's fees. The affidavit attached to the note was signed by John K. Fisher, one of the plaintiffs, and sworn to before John C. Dawson as notary public.

On June 20, 1958, an action of the defendants, have not paid judgment to file Dunbar's copy of the note and judgments and the judgment note attached, in lieu of the original note and judgments and judgment note filed on October 14, 1957, which was been lost. This copy was C.E.A. by the attorneys for the plaintiffs.

On July 18, 1958, on motion was entered filing the defendants leave to file motion in lieu of DEMURRER (in-[illegible] which were filed out lost.

The affidavits of John Stamp and [illegible] and [illegible], which were submitted and sworn to and executed by motion thereof, are, in substance, that the note for $1,000, which Dunbar C. 1957, made payable to the order of the plaintiffs, and upon which judgment was entered, was signed by all of the defendants without consideration

that the note was not delivered by the defendants to the plaintiffs nor authorized to be delivered; that said note was placed in escrow with the attorneys now appearing for the plaintiffs, together with a similar note executed by the plaintiffs to the order of the defendants, which note and a contract for the exchange of certain real estate was, by agreement of the parties, left in the possession of the attorneys for the plaintiffs.

It further appears from the affidavits that on or about September 3, 1931, one Soukup, a real estate broker and agent for the plaintiffs, represented that the plaintiffs had certain real estate which they would exchange for the property of the defendants, describing the plaintiffs' real estate, and represented that the real estate had a market value of $20,000; that on September 4, 1931, Soukup introduced to these defendants a Mr. Bernard as attorney for the plaintiffs, and he prepared an exchange contract; that the contract was not translated to the defendants, who were of Bohemian nationality; that reliance was placed upon the representations of Soukup as to the market values, and that they were thereby deceived.

The contract produced by the plaintiffs contained this provision:

> "Each of the parties hereto have executed to each other judgment notes in the sum of $2,000, which said notes are to be held as guarantee of faithful performance of this contract by the respective parties."

There is evidence offered by the defendants that the value of plaintiffs' real estate at the time the contract was signed was $12,225.

Upon the conclusion of the hearing, the court confirmed the judgment.

The defendants contend that the court erred in denying the defendants a jury trial after a demand was made and the jury fees were paid by them to the Clerk of the Circuit Court of Cook County.

that the bank was not informed by the defendants or the plaintiff nor authorized to be delivered; that neither the plaintiff in person with the attorney nor authorized for the plaintiff, signing -its a plaintiff was executed by the plaintiff to the order of the defendants, which note was a contract for the endorsing of notes and notes was, by agreement of the parties, left in possession of the attorney for the plaintiff.

It further appears from the evidence that on or about September 5, 1921, the defendants, a most active broker and agent for the plaintiff, represented that the plaintiff had certain real estate which they would exchange for the property of the defendants, delivering the plaintiff's real estate, and represented that the real estate had a market value of $20,000; that on September 1, 1921, Mandel Glaser-Hand to close Statutory - Tax. Deeds to property for the the plaintiff, and be informed in consequence; that the contract was not taken-listed on the defendants, who were of doubtful stability; that relations was placed upon the representations of Ludwig as to the market value, and that they were thereby deceived.

The contract referred to the plaintiff contained this statement:

> "Each of the parties hereto hereby represent to each other that no brokerage is due or to be paid, and each hereby agrees to hold the guarantor of initial performance of this contract by the respective parties."

There is evidence offered by the defendants that the value of plaintiff's real estate at the time the contract was signed was $12,000.

Upon the conclusion of the hearing, the court rendered the judgment.

The defendants contend that the court erred in denying the defendants a jury trial after a demand was made and the jury fees were paid by them to the Clerk of the Eleventh Court of Dade County.

Sec. 47, Chap. 53 of the statute relating to fees and salaries (Cahill's Ill. Rev. Stats.) provides, in part, as follows:

> "In counties of the third class the Clerk of the Court shall be entitled to receive, in addition to other fees allowed by law, the sum of Eight Dollars as a fee for the services of a jury. * * * Such fee shall be paid by the plaintiff, complainant or petitioner at the time of the commencement of such action or suit, * * * or if not so paid by the plaintiff, complainant, petitioner, or appellant, shall be paid by the defendant, respondent or appellee at the time of entering his appearance. If such fee shall not be paid by either party, no jury shall be called in the action, suit or proceeding and the same shall be tried by the court without a jury."

It is to be noted that the fee of $8.00 shall be paid at the time of the commencement of the suit by the plaintiff; that failing to do so, then for the first time the fee may be paid to the Clerk of the Court by the defendant at the time of filing his appearance in the cause. The parties are entitled to a jury trial, and this constitutional right is not denied to either party by this statute, provided the desire for a jury trial is indicated upon payment of the fees.

The Supreme Court in passing upon the statute under the Municipal Court Act in the case of Morrison Hotel Co. v. Kirsner, 245 Ill. 431, which act is somewhat similar to the act in question, said:

> "It is not a right to command the services of a jury without cost, but is of the same nature as the right to have official services performed by public officers, and a requirement for the payment of a reasonable amount for jury fees, such as will necessarily be required in every jury trial, is not a denial or encroachment upon the right."

This suit is based upon a confession of judgment, and thereafter, upon motion, the defendants were permitted to be heard by the court.

In the case of Morrison Hotel Co. v. Kirsner, supra, the Supreme Court held that in case of confession of judgment, the defendant is not in a position to demand a jury trial and pay the fees required until the trial court, in passing upon the motion to set aside the judgment, grants the defendant the right to be heard and offer his defense.

Sec. 47, Chap. 85 of the statute relating to fees and salaries (Smith's III. Rev. Stats.) provides, in part, as follows:

> "In counties at the time of the Clerk of the Court shall be entitled to receive, in addition to other fees allowed by law, the sum of fifty dollars as a fee for the services of a jury. * * * Such fee shall be paid by the plaintiff, demandant or petitioner at the time of the commencement of such action or suit, * * * or if not so paid by the plaintiff, complainant, petitioner, or equivalent, shall be paid by the defendant, respondent or appellee at the time of entering his appearance. If such fee shall not be paid by either party, no jury shall be called in the action, suit or proceeding and the case shall be tried by the court without a jury."

It is to be noted that the fee of $50.00 shall be paid at the time of the commencement of the suit by the plaintiff; that failing to do so, then for the first time the fee may be paid to the Clerk of the Court by the defendant at the time of filing his appearance in the cause. The parties are entitled to a jury trial, and this constitutional right is not denied to either party by this statute, provided the demand for a jury trial is initiated upon payment of the fee.

The Supreme Court in passing upon the statute under the Municipal Court Act in the case of Morrison Hotel Co. v. Kinney, 245 Ill. 421, which act is somewhat similar to the act in question, said:

> "It is not a right to demand the services of a jury without cost, but is of the same nature as the right to have official service performed by public officers, and a requirement for the payment of a reasonable amount for jury fees, such as will necessarily be required in every jury trial, is not a denial or encroachment upon the right."

This suit is based upon a confession of judgment, and thereafter, upon motion, the defendants were permitted to be heard by the court.

In the case of Morrison Hotel Co. v. Kinney, supra, the Supreme Court held that in case of confession of judgment, the defendant is not in a position to demand a jury trial and pay the fees required until the trial court, in passing upon the motion to set aside the judgment, grants the defendant the right to be heard and offer his defense.

The fact is that the instant case was on the jury calendar subject to trial by a jury. When the case appeared on the jury calendar is not certain. However, it remained on this calendar until the plaintiffs moved to strike the case from the calendar, which motion was allowed by the court. It was then that the defendants, for the first time, learned that the case was not to be submitted to a jury, and they immediately demanded a jury and paid the fees to the clerk of the court, as required by statute. The court, however, denied the motion of the defendants to restore the case to the jury calendar for trial, and the question arises were the defendants too late to demand a jury trial.

The defendants desired a trial by jury, and they were entitled to this constitutional right, provided it was not expressly waived. The facts justify the conclusion that the defendants did not by any act waive a jury trial. The trend of authorities is that courts when requested are inclined to grant jury trials. In the case before us it is clear that a jury trial was requested, but it is contended that the demand was made too late.

Upon the facts in the record, the case was on the jury calendar of the court, and the cause was to be submitted to a jury. The defendants were not required to act until the notice to strike this action from the jury calendar was allowed by the court. The defendants acted promptly, paid the jury fees required and asserted their right to these services. It is well to remember that the court has jurisdiction to set aside a judgment by default for want of an appearance and a plea by the defendant and to grant a hearing in a proper case. This is what the court did in this case by opening the judgment by confession, the filing of a plea, and a hearing on the merits. The court would have been fully justified, under the circum-

stances, in granting a jury trial, and it was reversible error to deny this right.

There are other questions which this court will not consider for the reason that a retrial of the cause will be necessary and we do not wish to express an opinion on facts.

The plaintiffs moved in this court to strike certain parts of the record, which motion was reserved to the final hearing. We have considered the motion and are not inclined to strike defendants' jury demand from the record for the reasons hereinbefore mentioned. As a part of said motion, the plaintiffs moved to strike certain copies of notices, the narr and cognovit, and the affidavits of Anna Zitney and Antonette Kral. The order of June 30, 1933, permitted the filing of the copies enumerated in the order, which order was approved by the plaintiffs by endorsing an O.K. The objection made in this court was not preserved when the trial court entered the order of July 16, 1932, and therefore the motion to strike will be denied.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HALL, P.J. AND WILSON, J. CONCUR

shoves, he crashes a just total, and is now vulnerable even to deep this night.

Those are not-to questions which this court will not ponder either for the reason that a ruling of the court will be unnecessary and we do not wish to engage in dicting on facts.

The plaintiff moved in this court to strike matters found at the record, which motion was answered in the first affirmative. In have considered the motion but are not inclined to strike [illegible] just because some the matter in the pleadings [illegible]. As a part of his motion, the plaintiff moved to strike matters [illegible] of matters, the most real [illegible], was the affidavits of [illegible] the trial. The order of June 20, 1870, overruled the filing of the motion [illegible] in the order, which order was excepted by the plaintiff by [illegible] to [illegible]. The objection made is that [illegible] not [illegible] when the trial court [illegible] the motion of July 12, 1870, and therefore the motion to strike will be denied.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Mills, J.-, not taking, J. Dissent

36323

TONY MANTEGNA, Administrator of the Estate of Joseph Pecore, Deceased,

(Plaintiff) Plaintiff in Error,

v.

GUONO ARRACHIELLO and FELICIA ARRACHIELLO,

(Defendants) Defendants in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

272 I.A. 611

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This was an action brought by the administrator of the estate of Joseph Pecore against Guono Arrachiello and Felicia Arrachiello, his wife, on account of the negligence of the defendants, which resulted in the death of plaintiff's intestate. At the end of all the evidence the court directed a jury to find a verdict in favor of the defendants.

The declaration consisted of two counts.

The first count charges that on August 12, 1928, the defendants Guono Arrachiello and Felicia Arrachiello, his wife, were the owners in fee simple of the property known as 3[illegible] South Racine Avenue, Chicago, Illinois, and as such owners, on or about the 20th day of July, 1928, leased the same to Camilla Pecore, mother of plaintiff's intestate, who went into possession of said premises with her children, including her son Joseph Pecore, the deceased; charges further that said building is a four story brick structure equipped with a fire escape; that the steps of said fire escape from the second floor to the ground were maintained in a horizontal position, so that the weight of a person on said horizontal steps would automatically lower the stairs to the ground; charges further that defendants permitted said fire escape to become rusted and corroded and in such bad condition that the same could not be lowered to the ground by the weight of a person thereon and that this condition had existed for a period of one month and of this condition the defendants had knowledge; charges further

that plaintiff's intestate while attempting to leave the building by means of a fire escape during a fire, was unable to lower said steps by stepping thereon by reason of the defective condition aforesaid and was badly burned and as a result of said burns plaintiff's intestate died.

The second count is practically the same as the first in so far as the negligence alleged is set out, but charges that this condition of the fire escape existed at the time the premises were leased and that the defendants permitted Camilla Pecore and the deceased to enter upon the premises without notifying them of the dangerous and defective condition.

To this declaration the defendants filed a plea of the general issue and a further plea denying ownership. The only evidence as to the ownership of the building in question is that of Camilla Pecore, who testified that she rented the apartment from Arrachiello at his house at 887 South Racine Avenue and paid him the money for the apartment. There is no testimony in the record as to the ownership of the apartment other than this, nor is there any evidence that the defendant Felicia Arrachiello had any interest in or title to the premises in question. From the declaration it would appear that the premises in their entirety were leased by the mother of the deceased. The evidence however, tends to show that she was but one of other tenants in the building.

Camilla Pecore, a sister of the deceased, testified that the fire happened early in the morning and that she was sleeping at the time and heard an explosion; that she saw her brother, the deceased, go through the window and that she followed him to the fire escape and that he fell from the third floor; that she saw him get up and go to the edge of the fire escape and appeared to be trying to push something down; that she heard the fireman tell him to get back into the building and that he went in through the window and

that plaintiff's intention while attempting to leave the building by means of a fire escape during a fire, was merely to lower said stage by stepping thereon by reason of the determined conditions aforesaid and was totally instead was a result of such being plaintiff's intention alone.

The second count is practically the same as the first.

As to the negligence alleged in each one, the evidence shows that conditions of the fire escape existed at the time the accident were known and that the defendants (emphasis) failure and the necessary to enter upon the premises without satisfying themselves of the hazardous and defective conditions.

To this declaration the defendants filed a plea of the general issue and a further plea denying ownership. The only evidence as to the ownership of the building in question is that of Dunlin Fraser, who testified that she rented the apartments from intervenable at his house of 227 Tuck Street Street and paid him the money for the apartments. There is no testimony in the record as to the ownership of the premises other than this, nor is there any evidence that the defendant relinquished control but any interest in or title in the premises in question. Even the declaration it would appear that the premises in their entirety were leased by the owner of the premises. The evidence however, tends to show that she was but one of other tenants in the building.

Dunlin Fraser, a sister of the deceased, testified that the fire happened early in the morning and that she was sleeping at the time and heard an explosion; that she ran her brother, the deceased, to towards the window and that she followed him to the fire escape and that he fell from the third floor; that she ran down up and up to the edge of the fire escape and screamed to be trying to push something down; that the house the firemen fell like to put back into the building and that he went in towards the window and

came out again and that she saw the fireman putting down the ladder with his hands. It is not clear just what the witness intended by this last statement. She further testified that her brother never had any sickness of any kind and was not paralyzed but was a healthy boy. The weight of the evidence, however, discloses the fact that the deceased was partially paralyzed.

The witness, Vece, testified that about two months prior to the fire his friend Mantegna was chasing him and he ran through the house and out of a window and down the fire escape and that when he came to the horizontal ladder of the fire escape he ran out upon it, but that it did not come down. Mantegna, who appears to be a son of the administrator, supported the testimony of Vece in this regard.

Bauer, captain of the fire department, testified that on reaching the fire he ordered the counter-balance or horizontal ladder to be pulled down and it was after this that the boy fell; that the horizontal ladder could not be used because it was enveloped in flames. He further testified that the counter-balance was pulled down by means of a pipe pole.

Shaunessy, a fireman, testified that the counter-balance was pulled down before the boy came down the fire escape; that at the time this was done the fire escape was too hot to be used.

Hussey, a captain of the fire department, testified that after he got there the boy was on the fire escape and he ordered him to go inside the window, which he did; that thereupon the horizontal stairway was pulled down but while the boy was inside and that the flames at the time were encircling the fire escape so that it could not be used.

Seemann, a city fireman, testified that after the fire he tested the fire escape and found it was in good shape.

ness out again and then she saw the firemen getting from the ladder with his hands. It is not clear just what the witness intended by this last statement. The further testified that her brother never had any sickness of any kind and was not paralyzed but was a healthy boy. The judge of the minimum, however, disclosed the fact that the deceased was partially paralyzed.

The witness, Ivy, testified that about ten months prior to the fire his friend Snodgrass was drawing him out of an upstairs window and he was thrown out and that when he came to the burnmental ladder of the fire escape to run out upon it, he was then in all not more than. Snodgrass, who appears to be a son of the ambulance-driver, supported the testimony of Ivy in this regard.

Dunn, captain of the fire department, testified that on reaching the fire he ordered the counter-balance or horizontal ladder to be pulled down but it was after this that the boy fell; that the horizontal ladder could not be used because it was enveloped in flames. He further testified that the counter-balance was pulled down by means of a rope.

Dunnerty, a fireman, testified that the counter-balance was pulled down before the boy came down the fire escape; that at the time this was done the fire escape was too hot to be used.

Cooney, a captain of the fire department, testified that after he got there the boy was on the fire escape and he ordered him to go inside the window, which he did; that thereupon the horizontal ladder was pulled down but while the boy was inside and that the flames as the line were connecting the fire escape so that it could not be used.

Freeman, a city fireman, testified that after the fire he tested the fire escape and found it was in good shape.

Donuhue, a city fireman, called on behalf of plaintiff, testified that as far as he could see there was nothing wrong with the fire escape.

Daro, a physician who was living in the building at the time of the fire, testified that he went down the fire escape while the fire was in progress and proceeded along the horizontal steps, but that they would not go down and that he had to jump off at the end; that there was an iron bar at right angles with the building obstructing the use of this fire escape; that this iron bar was under the horizontal stairs and that he examined it and found that it was not a part of the balance; that it did not look like a support and did not appear to be a part of the fire escape.

So far as the record discloses there is no testimony whatsoever in the record tending to support the averment of the declaration to the effect that the fire escape was rusted and corroded and out of order and out of repair. It is insisted on behalf of plaintiff in error that under the allegation of the declaration, namely, that the fire escape was out of order and repair, the proof that there was an iron bar extending out of the building which was no part of the fire escape was, nevertheless, competent as tending to sustain the allegation of the declaration. The evidence of the two witnesses Veoe and Mantegna was evidently introduced for the purpose of showing that the condition had existed sometime prior to the fire. These witnesses were the two men who testified that one chased the other through the building and over the fire escape about a month prior to the occurrence. As pointed out one of these men was the son of the administrator. There is no testimony to the effect that the defendants knew of this condition or were the cause of it. It would have been difficult for defendants to have anticipated this ground of recovery as it was not charged in the declaration and the obstruction preventing the lowering of the steps, if such obstruction did exist, was no part

Therefore, a slip (perhaps, rather an "error of judgment") satisfied them so far as to make one leave the building among with the fire escape.

Now, a supposition who was living in the building at the time of the fire, testified that he was then the rear escape while the fire was in progress and proceeded along the neighboring roofs, but that they would not go down and that he had to jump off to the ground. Only that there was no hose but it might begin with the building observing the man of this fire carrying that this time but was under the neighboring eaves and that he proceeded it and found that it was not a part of the building that it did not look like a warrant and did not appear to be a part of the escape.

So far as the record discloses there is no testimony whatever in the record tending to support the payment of the defendants as the effect that the fire escape was tested and repaired and not of order and in of safety. It is insisted on behalf of plaintiff in error this under the direction of the defendants, namely, that the fire escape was not of order and strong, the proof that there was no from put attaching and of the building which was to part of the fire escape was, respectively, insufficient to sustain the liability of the defendants. The evidence of the two witnesses was and sufficiently introduced for the purpose of showing that the condition and repair escape prior to the fire. These witnesses were the two men who testified that measured the distance through the building and over the fire escape about a month prior to the conversation. It appeared but one of these men was the son of the defendants. There is no testimony to the effect that the defendants knew of this condition or were for cause of it. It would have been difficult for defendants to have anticipated this ground of recovery as it was not charged in the declaration and the evidence presented the jurisdiction of the court, if such objection did exist, was so just

of the fire escape.

Defendants made a motion for a directed verdict which was sustained. The Supreme Court in the case of Chicago Union Traction Co. v. Brethauer, 223 Ill. 521, in its opinion, says:

> "When the charge is one cause of action and the proof is another and different cause, there is a variance within the ordinary acceptation of that term. There is, in such case, also a literal failure of the proof to sustain the allegations of the declaration. We have often held that where a motion to direct a verdict has been denied, the only question preserved for our consideration is whether the evidence, when considered together with all the reasonable inferences to be drawn therefrom, fairly tends to support the cause of action as set out in the declaration."

It is true that the rule is that it is necessary to point out a variance between the declaration and the proof. Where, however, there is no testimony tending to sustain the declaration, the question is raised on a motion to direct a verdict. In the case at bar in our opinion there was no evidence tending to show that the fire escape was defective. There being a total absence of proof, therefore, in this record, the court properly directed a verdict. The iron bar projecting from the building, if such was the fact, was a cause entirely foreign to that charged in the declaration.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND MEDEL, J. CONCUR.

of the file method.

Unfortunately while a method for a directed verdict which was established. The reason that is the case of Simmons Bakes Counties Co.

v. Zantzinger, 201 Ill. 201, in the opinion, says:

> "Even the Bailiff is not minor of action and the court is monitor and directors thereon. There is a distance within the ordinary communication of this kind. Thus in, in such case, then a jurors judgment of the proof be against the allegations of the pleadings. We have stated but some cases where a jurors is directed a verdict for the court. The only cases where evidence consisting the not misdirections in making the verdicts, when conclusions logically with all the circumstances to be issue therefrom. Jurors cannot be required the trouble of trying an act not in the declaration."

It is true that the rule in this is necessary to point out a difference between the declaration and the proof. There, however, there is no instance having to enable the declaration, the question is raised in a motion to direct a verdict. In the case at bar in our opinion there was no evidence tending to show that the jury acted on information. There being a total absence of proof, therefore, in this record, the court improperly directed a verdict. The jury was prejudiced from the building, if such was the fact, by a cause entirely foreign to that charged in the declaration.

For the reasons stated in this opinion the judgment of the Superior Court is reversed.

Judgment reversed.

Full, P.J., Mc Davis, J., concur.

36354

77 H

FRANKIE A. PRICE, (Complainant) Appellant,	APPEAL FROM
v.	CIRCUIT COURT,
GEORGE E. PRICE, (Defendant) Appellee.	COOK COUNTY.

272 I.A. 612

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON delivered the opinion of the court.

Complainant filed her original bill against the defendant, asking for separate maintenance. This bill was filed May 20, 1931. An amended bill was filed June 15, 1931, upon an order of court entered June 26, 1931, nunc pro tunc as of June 12, 1931.

According to the testimony of complainant upon the trial, she left the home of the defendant June 13, 1931, after the filing of the original bill. Complainant testified that the defendant told her in 1916 that he had been unfaithful, but she continued to live with him; that again in 1923 he confessed to her intimacy with a woman, but that she still continued to live with him; that in 1923 the defendant had a social disease and again in 1930, but that she was immune and continued to live with him up to the time of the separation. Complainant testified further that she saw him, the defendant, at his father's house on May 11, 1931, talking with one Josephine Lebr, at which time she had a quarrel with the said Josephine Lebr, but there is nowhere in the record any evidence that the conduct of the defendant and the Lebr woman was improper. The only testimony corroborating the complainant was that of the witness Hall who testified that she saw the defendant kiss a woman in 1912.

The chancellor heard the testimony and saw the witnesses

Complainant filed her original bill against the defendant, asking for separate maintenance. This bill was filed May 20, 1921. An amended bill was filed June 16, 1921, upon an order of court entered June 26, 1921, nunc pro tunc as of June 12, 1921.

According to the testimony of complainant upon the trial, she left the home of the defendant June 12, 1921, after the filing of the original bill. Complainant testified that the defendant told her in 1918 that he had been unfaithful, but she continued to live with him; that again in 1920 he confessed to her intimacy with a woman, but that she still continued to live with him; that in 1923 the defendant had a social disease and again in 1920, but that she was immune and continued to live with him up to the time of the separation. Complainant testified further that she saw him, the defendant, at his father's house on May 11, 1921, talking with one Josephine Lehr, at which time she had a quarrel with the said Josephine Lehr, but there is nowhere in the record any evidence that the conduct of the defendant and the Lehr woman was improper. The only testimony corroborating the complainant was that of the witness Hall who testified that she saw the defendant kiss a woman in 1918.

The chancellor heard the testimony and saw the witnesses

and was in a better position than this court to decide the issues as to whether or not defendant's conduct had been such as to entitle the complainant to live separate and apart from the defendant. There does not appear to be any evidence in the record showing any conduct on the part of defendant after the last condonation which would sufficiently entitle her to relief. It was within the province of the chancellor to pass on the testimony and to weigh the evidence and his decision will not be lightly disregarded by a court of review. Telford v. Howell, 220 Ill. 52.

The burden of proof was upon the complainant to sustain the allegations of her bill. Wasson v. Wasson, 236 Ill. App. 505.

We have examined the record and considered the testimony and see no reason for substituting our judgment for that of the chancellor, who heard and saw the witnesses.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

and was in a petition seeking that court to direct the lawyer as to whether or not defendant's conduct had been such as to entitle the complainant to life separately and apart from the defendant. There does not appear to be any evidence in the record showing any movement on the part of defendant after the last mentioned date which would reasonably entitle her to relief. If we within the province of the chancellor to pass on the sufficiency and to weigh the evidence and his decision will not be slightly disregarded by a court of review. Tufford v. Morrell, 90: 111, 32.

The burden of proof was upon the complainant to sustain the allegations of her bill. Jones v. Jones, 208 Ill. App. 500. We have examined the record and considered the testimony and see no reason for substituting our judgment for that of the chancellor, who heard and saw the witnesses.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Eldridge, P.J. and Wilson, J. concur.

78 H

36372

DOROTHE E. OWEN, (Plaintiff) Appellee, v. CITY OF CHICAGO, a municipal corporation, (Defendant) Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

272 I.A. 612

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action against the City of Chicago for damages because of injuries sustained while she was riding in a cab over one of the streets which was under the control of the defendant, City of Chicago.

From the evidence it appears that the taxicab ran into a hole or depression in the street, as a result of which plaintiff was thrown against the top of the cab and received the injuries of which she complained. It also appears that the plaintiff, together with a woman by the name of Gullickson, had attended a performance at a theatre on Montrose avenue on the night of June 10, 1930. After the performance they took the cab which proceeded in an easterly direction to Hermitage avenue and then north on that street. The pavement was asphalt. At a point on Hermitage avenue between Leland and Lawrence, where the accident occurred, the Peoples Gas Light & Coke Company had been doing some excavating in the street for the purpose of laying gas pipes. This work had been going on for about a month prior to the accident, but the work had evidently been finished about two weeks before the accident happened. There were holes, however, left in the pavement which had not been fully repaired. The driver of the cab testified that the trench which

STATE

MORTON E. GREN,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a municipal corporation,

(Defendant) Appellant.

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action against the city of Chicago for damages because of injuries sustained while she was riding in a cab over one of the streets which was under the control of the defendant, city of Chicago.

From the evidence it appears that the streets are like a hole or depression in the street, as a result of which plaintiff was thrown against the top of the cab and received the injuries of which she complained. It also appears that the plaintiff, together with a woman by the name of Gullickson, had attended a performance at a theatre on Montrose avenue on the night of June 12, 1930. After the performance they took the cab which proceeded in an easterly direction to Hermitage avenue and then north on that street. The pavement was asphalt. At a point on Hermitage avenue between Leland and Lawrence, where the accident occurred, the Peoples Gas Light & Coke Company had been doing some excavating in the street for the purpose of laying gas pipes. This work had been going on for about a month prior to the accident, but the work had evidently been finished about two weeks before the accident happened. There were holes, however, left in the pavement which had not been fully repaired. The driver of the cab testified that the trench which

he struck was running north and south in the center of the street and a little bit toward the left side; that he was driving carefully at the time and did not notice the particular part of the trench which was projecting from the west curb out into the street.

The plaintiff testified that on her way to the theatre, she was walking down Hermitage avenue and that she saw these ditches or depressions.

Defendant insists that the plaintiff was acquainted with the condition of the street and, therefore, was guilty of contributory negligence. The question of contributory negligence is one of fact for the jury unless the circumstances are such that all reasonable minds would agree otherwise. The mere fact that the plaintiff had knowledge of the condition does not necessarily, as a matter of law, make her guilty of contributory negligence in the use of the street. Moreover, at the time of the accident she was a passenger riding in a cab for hire and the jury had a right to consider this question, together with all the other facts and circumstances in the case, as bearing upon the question of contributory negligence.

We are of the opinion that the court did not err in not directing a verdict at the end of plaintiff's case. No evidence was introduced by the defendant and the record is before us only on the evidence of the plaintiff and supporting witnesses.

While the plaintiff was upon the stand she was asked whether or not she had been paid any money by the Cab Company, and she replied that she had, and stated that they paid her so that she would not sue them. She also stated that she refused to make any settlement with the Cab Company, but had received $300 to pay her medical expenses. It is insisted that this constituted a settlement which released the city as a joint tort feasor. From her evidence, however, it appears that she had refused to settle with the taxicab

he stopped was running north and south in the center of the street and a little his stated the last night that he was driving negligently at the time and did not notice the particular part of the tracks which was projecting from the west curb out into the street.

The plaintiff testified that on her way to the theatre, she was walking down Burnside avenue and that she saw these ditches or depressions.

Defendant insists that the plaintiff was acquainted with the condition of the street and, therefore, was guilty of contributory negligence. The question of contributory negligence is one of fact for the jury unless the circumstances are such that all reasonable minds would agree otherwise. The mere fact that the plaintiff had knowledge of the condition does not necessarily, as a matter of law, make her guilty of contributory negligence in the use of the street. Moreover, at the time of the accident she was a passenger riding in a car for hire and the jury had a right to consider this question, together with all the other facts and circumstances in the case, as bearing upon the question of contributory negligence.

We are of the opinion that the court did not err in not directing a verdict at the end of plaintiff's case. No evidence was introduced by the defendant and the record is before us only on the evidence of the plaintiff and supporting witnesses.

While the plaintiff was upon the stand she was asked whether or not she had been paid any money by the Cab Company, and she replied that she had, but stated that they paid her so that she would not sue them. She also stated that she refused to make any settlement with the Cab Company, but had received $200 to pay her medical expenses. It is insisted that this constituted a settlement which released the city as a joint tort feasor. Upon her evidence, however, it appears that she had refused to settle with the taxicab

company, but she did receive the money on condition that she was not to sue that particular company and this amounted to a covenant not to sue. City of Chicago v. Babcock, 143 Ill. 358; West Chicago Street Railroad Co. v. Piper, 165 Ill. 325.

If there were any papers executed at the time this money was paid by the Cab Company they could have been brought into court under a proper subpoena. As the evidence stands before us it does not establish the fact that a settlement had been made, but rather that there was an agreement not to sue.

The plaintiff was rendered unconscious after the accident and was taken to the home of Mrs. Gullickson. From there she went home in a cab and the next day went to the office where she was employed, where she remained for about an hour, and was then compelled to return to her home. A physician was called and she was taken to the Lake View Hospital where she was put to bed. She was nauseated and had pains and blurred vision, which had continued up to the day of the trial. According to the testimony of the plaintiff she was in good health before the accident, but has been affected with headaches and pains since that time. The verdict was for $5,000, and from the testimony of plaintiff and the attending physicians, we are of the opinion that this was not excessive.

It is insisted that the court erred in refusing to give certain instructions on behalf of the defendant, but we find that the jury was fully instructed as to the duty of the plaintiff and the liability of the city in their instructions offered and given.

We find no error in the record and for that reason the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

company, but she did receive the money on condition that she was not to sue that particular company and this amounted to a covenant not to sue. City of Quincy v. Jackson, 145 Ill. 548; Cook Chemical Street Railway Co. v. Ellis, 188 Ill. 549.

If there were any papers executed at the time this money was paid by the Cook Company they could have been brought into court under a proper subpoena. In the evidence beside before us it does not establish the fact that a settlement had been made, but rather that there was no agreement at all to sue.

The plaintiff was rendered unconscious after the accident and was taken to the home of Mrs. Smallidge. From there she went home in a cab and the next day went to the office where she was employed, where she remained for about an hour, and was then compelled to return to her home. A physician was called and she was taken to the Lake View Hospital where she was put to bed. She was suffering and had pains and blurred vision, which had continued up to the day of the trial. According to the testimony of the plaintiff she was in good health before the accident, but has been affected with headaches and pains since that time. The verdict was for $5,000, and from the testimony of plaintiff and the attending physicians, we see no ground for the opinion that this was not excessive.

It is insisted that the court erred in refusing to give certain instructions on behalf of the defendant, but we find that the jury was fully instructed as to the duty of the plaintiff and the liability of the city in their instructions offered and given.

We find no error in the record and for that reason the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

Mill, P.J. and Smith, J. concur.

36418

ANDREW SZYMCZAK,

Defendant in Error,

v.

HENRY WLOSTOW,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

272 I.A. 612

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action against the defendants for $997, advanced to them for the purpose of remodeling a house owned by the defendants. The action was tried by the court without a jury, resulting in a finding in favor of the plaintiff for the sum of $434, and judgment was entered upon the finding, from which judgment this appeal was prayed and allowed.

While the judgment in this case was against the two defendants, the record discloses that the appeal was prayed for by Henry Wlostow alone.

We are not aided in our consideration of the cause by briefs filed on behalf of the plaintiff.

It is urged as a ground for reversal that the finding and judgment are contrary to the weight of the evidence and that the court erred in permitting the defendant Verna Wlostow to testify, on the ground that she was a former wife of the defendant Henry Wlostow.

From the evidence it appears that the money was loaned for the purpose of repairing and remodeling a building owned by the defendants. Henry Wlostow, one of the defendants, claimed that the money had been paid back, but this was contradicted by the plaintiff who acknowledged receipt of $1500 from the defendants, but insisted that there was other money loaned which was that set out in the statement of claim.

The court heard the evidence and saw the witnesses and we see no reason for disturbing the finding of the court upon the ground

Opinion filed Oct. 26, 1933

Mr. justice Allen delivered the opinion of the court.

Criminal proceeding was begun against the defendants Ray Ray, charged in four counts of possessing a house used for the distribution, the action was taken by the court without a jury, resulting in a finding of guilty for the use of this, and judgment was entered upon the finding. Two motions for arrest were overruled and allowed.

While the judgment in this case was reversed the two defendants, the record disclosed that the appeal was prayed for by Henry Clayton alone.

We are not called on our consideration of the cause by briefs filed on behalf of the plaintiff.

It is urged as a ground for reversal that the finding and judgment was contrary to the weight of the evidence and that the court erred in admitting the testimony from witnesses in rebuttal, on the ground that she was a lessee with it of the defendant Henry Clayton.

From the evidence it appears that the house was leased for the purpose of repairing and remodeling a building owned by the defendants. Henry Clayton, one of the defendants, claimed that the money had been paid back, but this was contradicted by the plaintiff who testified that it had been delivered to the defendants, but believed that there was still money having which was that due at the commencement of claim.

The court heard the evidence and saw the witnesses and no error for disturbing the finding of the court upon the ground

of the weight of the evidence.

From the facts it appears, however, that the plaintiff was a brother of Verna Alostow; that at the time the money was loaned to the defendants, Henry Alostow and Verna Alostow were husband and wife. Before the trial, however, the defendants separated. It is insisted that upon the trial of this cause Verna Alostow was not a competent witness as the action was against herself and husband jointly and she was disqualified because of the fact that the suit was one against herself and husband jointly. We are referred to the case of Hyman, et al v. Harding, 162 Ill. 357, but an examination of this case shows it is not in point. In that case the action was not for necessaries but for a ring purchased by the wife, and plaintiff in that action attempted to hold the husband and wife jointly. In the present case the claim was for money loaned the defendants jointly for the repairing and remodeling of their home. Under such circumstances she was a competent witness and could be called by either party.

We see no error in the record and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

of the weight of the evidence.

Upon the facts in dispute, however, that the plaintiff was a member of Iyrna Jackson's club at the time the injury was inflicted to the defendants, Henry Jackson and Tom Glenton were material and are. Before the trial, however, the defendants objected. It is insisted that upon the trial of this cause first, Lawton was not a competent witness on the ground he was criminally and pecuniarily interested in the action and therefore disqualified because of the fact that he might be sued criminally and mulcted pecuniarily. In our reliance in the case of Jones, et al v. Hudson, 143 Ill. 397, has a consideration of this most among it is not in point. In that case the action was not for compensation but for a wrong committed by the city, and plaintiff in that action attempted to hold the husband and wife jointly. In the present case the claim was for money loaned the defendants jointly for the repairing and remodeling of their house. Under such circumstances the use a competent witness had would be called by either party.

It was no error in the lower and for this reason the judgment of the municipal court is affirmed.

Affirmed.

Mills, P.J., and Kerr, J. concur.

36438

WALTER J. VANDERSLICE,

Appellee,

v.

SARAH E. EDWARDS and WILLIAM C. EDWARDS,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

272 I.A. 612

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, Sarah E. Edwards and William C. Edwards, from a judgment for possession in a suit for forcible detainer entered in the Municipal Court and brought by the plaintiff Vanderslice. The cause was tried by the court without a jury and no point is made on the pleadings.

On the trial plaintiff introduced in evidence a deed to the property in question dated August 13, 1926, from the defendants to the plaintiff and also a written demand for immediate possession. This proof was sufficient to have entitled plaintiff to possession without any further proof. It appears, however, that defendants filed a bill in the Superior Court charging that the deed in question was, in fact, a mortgage and that the plaintiff was not entitled to possession except upon a foreclosure proceeding and prayed for an injunction restraining the prosecution of the forcible detainer proceedings in the Municipal Court. It also appears in the records that on or about September 17, 1927, a master's deed to said premises was issued and delivered to the plaintiff and newly filed of record in the Recorder's Office of Cook County. Subsequently, the Superior Court dissolved the bill praying for an injunction against the prosecution of the forcible entry and detainer suit and the cause came on for hearing in the Municipal Court where judgment was entered for the plaintiff. It is this cause that is before us on appeal from the Municipal Court.

of the valids of the judgment.

Even the Judge is involved. However, this the plaintiff was a bearer of Corporation Bonds, that at the time the money was loaned to the defendants, many claims and other claims were barred and void. Before the trial, however, the defendants appealed. It is learned that upon the trial of this whole first review was not a sufficient claims on the notice was against herself and husband jointly and the was dismissed because of the fact that he said was not against herself and husband jointly. In his reported to the case of Jones, et al v. Mortgage, 140 Ill. 267, but in consideration of this case above it is not in point. In that case the notice was not for consideration but for a note produced by the life and plaintiff in that action attempted to hold the husband and wife jointly. In the present case the claims are for money loaned the defendants jointly for the repairing and remodeling of their home. Under such circumstances the use a separate witness can only be called by either party.

It was re-argued in the second and for this reason the judgment of the municipal court is affirmed.

Affirmed.

Smith, P.J., and Niess, J., concur.

38438

WALTER J. VANDERSLICE,
Appellee,
v.
SARAH E. EDWARDS and WILLIAM C. EDWARDS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

272 I.A. 612

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, Sarah E. Edwards and William C. Edwards, from a judgment for possession in a suit for forcible detainer entered in the Municipal Court and brought by the plaintiff Vanderslice. The cause was tried by the court without a jury and no point is made on the pleadings.

On the trial plaintiff introduced in evidence a deed to the property in question dated August 13, 1926, from the defendants to the plaintiff and also a written demand for immediate possession. This proof was sufficient to have entitled plaintiff to possession without any further proof. It appears, however, that defendants filed a bill in the Superior Court charging that the deed in question was, in fact, a mortgage and that the plaintiff was not entitled to possession except upon a foreclosure proceeding and prayed for an injunction restraining the prosecution of the forcible detainer proceedings in the Municipal Court. It also appears in the records that on or about September 17, 1927, a master's deed to said premises was issued and delivered to the plaintiff and newly filed of record in the Recorder's Office of Cook County. Subsequently, the Superior Court dissolved the bill praying for an injunction against the prosecution of the forcible entry and detainer suit and the cause came on for hearing in the Municipal Court where judgment was entered for the plaintiff. It is this cause that is before us on appeal from the Municipal Court.

Opinion filed Oct. 22, 1982

Mr. Justice Moore delivered the opinion of the Court:

This is an appeal by the defendants, Frank S. Zolezzi and Eileen S. Johnson, from a judgment for possession in a suit for forcible detainer entered in the municipal court and through to the circuit tribunals. The court was right in the court without a jury and in such an order.

On the 22nd plaintiff instituted an action a deed to the property in question dated August 21, 1979. Then the defendants in the premises and also a written demand for immediate possession. This proof was sufficient to have established plaintiff's possession without any further proof. It appears, however, that defendants filed a bill in the Superior Court contending that the deed in question was, in fact, a mortgage and that the plaintiff was not entitled to possession except upon a foreclosure proceeding and prayed for an injunction restraining the possession of the forcible detainer proceedings in the municipal court. It also appears in the record that on or about September 16, 1980, a master's deed in the suit previous was issued and delivered to the plaintiff and shortly filed of record in the recorder's office of Cook County. Consequently, the Superior Court dismissed the bill upholding for an injunction restraint the prosecution of the forcible entry and detainer suit and the issue came on for hearing in the municipal court where judgment was entered for the plaintiff. It is this order that is before us on appeal from the municipal court.

Equitable defenses affecting the title to real estate will not be considered in an action in forcible entry and detainer as all equitable matters are cognizable only in a court of equity. Peters v. Balke, 170 Ill. 304; Gardner v. Cohn, 95 Ill. App. 26; Kepley v. Luke, 106 Ill. 395.

It is apparent from the record that the defendants sought relief in a court of equity and had a complete hearing as to all such equitable matters. Upon a dissolution of the injunction plaintiff had the right to proceed with his action in the Municipal Court. The deed on its face was a straight deed of conveyance and not a mortgage apparent on its face. The dissolution of the injunction removed any barrier to plaintiff's right to proceed. The proceedings in equity were no concern of the Municipal Court. The action was still based on the deed. (Par. 2. Sec. 2, provision 6, Chap. 57, Cahill's Ill. Rev. Stat.) If the deed on its face had shown it was a mortgage or trust deed, a different situation would have been presented.

We see no reason for interfering with the judgment for possession entered by the Municipal Court and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

Equitable defenses affecting the title to real estate will not be considered in an action in Ejectment which involves an all equitable matters are cognizable only in a court of equity. Jones v. Jones, 177 Ill. 404; Gardner v. Jones, 95 Ill. 439; Easley v. Lane, 108 Ill. 395.

It is evident from the record that the defendants sought relief in a court of equity and had a complete hearing on all such equitable matters. Upon a dissolution of the injunction plaintiff had the right to proceed with his action in the municipal Court. The deed on its face was a straight deed of conveyance and not a mortgage expressed on its face. The dissolution of the injunction removed any barrier to Plaintiff's right to proceed. The proceedings in equity were no concern of the municipal Court. The matter was still based on the deed. (Par. 3, Sec. 9, Article 6, Chap. 87, Smith's Ill. Rev. Stat.) If the deed on its face had shown it was a mortgage or trust deed, a different situation would have been presented.

We see no reason for interfering with the judgment for possession entered by the municipal Court and its also affirm the judgment of the municipal Court in affirmed.

PRESENT JUSTICES.

Hall, P.J. McCullough, J. Jones.

36447

GUARDIAN WAREHOUSING COMPANY, a corporation, (Plaintiff) Appellant, v. ROYCE A. KELLEY, (Defendant) Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 613

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff secured a judgment by confession in the Municipal Court against the defendant in the sum of $4,642, based upon twelve promissory notes for the sum of $400 each, signed by the defendant and dated April 30, 1930 and the last day of each month thereafter up to and including March 31, 1931. Each note was executed by defendant upon receipt of his monthly check.

June 7, 1932, after the entry of said judgment, the defendant filed a petition praying that said judgment be vacated and that he be allowed to appear and defend. This motion was allowed, the judgment was vacated and the petition was ordered to stand as an affidavit of merits and the cause submitted to the court without a jury. After a full hearing the trial court found the issues against the plaintiff and entered judgment in favor of the defendant, from which this appeal has been prayed and allowed.

We have not been aided in our consideration of the cause by briefs on behalf of the defendant.

Defendant's position was that he had been employed by the plaintiff corporation and was receiving the sum of $250 per month and expenses; that a certain company by the name of J. H. Pratt Company, a corporation, was in the hands of a receiver and that the plaintiff company arranged to have defendant appointed as one of the receivers and that in the event this was accomplished the plaintiff was to increase his salary to the sum of $400 and expenses which was to be returned to the plaintiff out of such fees as he

BEFORE

GEORGIA WOODWORKING COMPANY, a corporation,

(Plaintiff) Appellant,

v.

BOYCE A. FRAZIER,

(Defendant) Appellee.

Appeal from Superior Court, Bibb County.

Hon. Joseph Hall, Judge.

Submitted October 12, 1921.

Decided November 30, 1921.

Action for damages. Judgment for defendant. Plaintiff excepts.

1. Motion dismiss exceptions for failure of the bill of exceptions to show that the defendant in the sum of $4,240, based upon twelve promissory notes for the sum of $353 each, signed by the defendant and dated April 30, 1920 and the last day of each month thereafter up to and including March 31, 1921. Such notes are secured by defendant upon receipt of six monthly shares.

June 7, 1920, after the entry of said judgment, the defendant filed exceptions praying that said judgment be vacated and that he be allowed to amend and defend. This motion was filed. The judgment was vacated and the petition was ordered to stand as an affidavit of merits and the case submitted to the court without a jury. After a full hearing the trial court found the issues against the plaintiff and entered judgment in favor of the defendant, from which this appeal has been docketed and allowed.

We have not been misled in our consideration of the errors by briefs on behalf of the defendant.

Defendant's position was that he had been employed by the plaintiff corporation and was receiving the sum of $250 per month and expenses; that a certain company by the name of A. H. Pratt Company, a corporation, was in the hands of a receiver and that the plaintiff company arranged to have defendant appointed as one of the receivers and that in the event this was accomplished the plaintiff was to increase his salary to the sum of $400 and expenses which was to be returned to the plaintiff out of such fees as he

should receive as a receiver to the extent of $400 per month and the balance, if any, was to go to the defendant; that to protect the plaintiff the defendant was to execute and did so execute an assignment of his fees as receiver and, as additional protection to the plaintiff, was to execute promissory notes each month for the purpose of showing the receipt of said salary and expenses during the course of his employment from the first of April on.

Plaintiff's position appears to be that the defendant was to receive his compensation solely from the receivership and that the moneys evidenced by the promissory notes were advancements to him for the purposes of defraying his expenses in carrying on the business of the receivership and such business for the plaintiff as he was able to do, as it was uncertain as to the exact time at which the defendant could realize anything from the receivership.

In support of their position plaintiff offered in evidence a memorandum dated April 1, 1930, from which it would appear that the payments made to Kelley were advances to assist him during the time he was acting as receiver and until such time as he would be able to realize from his receivership fees. The trial court refused to permit this document to be introduced in evidence and, therefor, it was not considered in arriving at the finding.

A document which appears to be defendant's exhibit 1, and purports to be an assignment of his fees as receiver, was tendered by defendant and received in evidence. This document is dated June 5, 1930 and signed by the defendant.

The oral evidence in the case is conflicting and we are of the opinion that the trial court erred in refusing to admit the document of April 1, 1930. If there had been no written contracts between the parties or memorandum made at the time, a judgment should properly have been in favor of the plaintiff, as under the circumstances

should receive as a receiver to the extent of $600 per month and the balance, if any, was to go to the defendant; that to protect the plaintiff the defendant was to endorse and did so endorse an assignment of his from as receiver and, as additional protection to the plaintiff, was to execute promissory notes each month for the purpose of showing the receipt of said salary and expenses during the course of his employment from the first of April on.

Plaintiff's position appears to be that the defendant was to receive his compensation solely from the receivership and that monies withdrawn by the promissory notes were disbursements to him for the purpose of defraying his expenses in carrying on the business of the receivership and such business for the plaintiff as he was able to do, or it was necessary for the exact time at which the defendant could realize anything from the receivership.

In support of their position plaintiff offered in evidence a memorandum dated April 1, 1930, from which it would appear that the expenses made to Bailey were advances to assist him during the time he was acting as receiver and until such time as he would be able to realize from his receivership fees. The trial court refused to admit this document to be introduced in evidence and, therefore, it was not considered in arriving at the finding.

A document which appears to be defendant's exhibit 1, and purports to be an assignment of his fees as receiver, was tendered by defendant and received in evidence. This document is dated June 5, 1930 and signed by the defendant.

The oral evidence in the case is conflicting and we are of the opinion that the trial court erred in refusing to admit the document of April 1, 1930. If there had been no written contracts between the parties or memorandum made at the time, a judgment should properly have been in favor of the plaintiff, as under the circumstances

in this case parol evidence would not have been admissible to vary the terms of the notes.

It is contended by the defendant that there was no consideration for the giving of the notes, but an examination of the evidence discloses that the giving of the notes was unconditional, but the condition, if any, existed in the manner of payment. In other words, it is defendant's position that the notes were not to be paid by him, the defendant, but were payable out of his fees received from the receivership of J. H. Pratt Company as evidenced by the assignment agreement of June 5, 1930.

In the case of Handley v. Drum, et al, 237 Ill. App. 587, it appears that a certain note was given, which on its face appeared to be unconditional, but that there was an arrangement made between the parties that it was to be payable out of dividends. It was there held that the agreement in that case did not make the delivery of the note conditional, but merely its payment, and that parol proof was not admissible to contradict the express terms of the note. To the same effect see Weinstein v. Sprintz, 234 Ill. App. 492.

The burden of proof in this case was upon the defendant and it was necessary for him to make out his defense by a preponderance of the evidence. If the action rested purely upon the notes and oral evidence, we would reverse with a finding of fact in favor of the plaintiff, but the proof rested partially in parol and partially in writing. Under such circumstances it, therefore, became important to consider all the instruments in writing pertaining to the agreement having to do with the execution of the notes and, for that reason, plaintiff's exhibit 14 was competent. Moreover, it was executed prior to the appointment of the defendant as receiver and was made at or about the time of the alleged agreement. A copy of this agreement was mailed to the defendant within a day or two after

in this case parol evidence would not have been admissible to vary the terms of the note.

It is contended by the defendant that there was no consideration for the giving of the notes, but on examination of the evidence discloses that the giving of the notes was unconditional, but the condition, if any, existed in the manner of payment. In other words, it is defendant's position that the notes were not to be paid by him, the defendant, but were payable out of his fees received from the receivership of J. M. Pratt Company as evidenced by the assignment agreement of June 1, 1920.

In the case of Hughley v. Brown, et al, 207 Ill. App. 527, it appears that a certain note was given, which on its face appeared to be unconditional, but that there was an arrangement made between the parties that it was to be payable out of dividends. It was there held that the agreement in that case did not make the delivery of the note conditional, but merely its payment, and that parol proof was not admissible to contradict the express terms of the note. To the same effect see Mangelin v. Durham, 224 Ill. App. 627.

The burden of proof in this case was upon the defendant and it was necessary for him to make out his defense by a preponderance of the evidence. If the action rested purely upon the notes and oral evidence, we would reverse with a finding of fact in favor of the plaintiff, but the proof rested partially in parol and partially in writing. Under such circumstances it, therefore, behoves the court to consider all the instruments in writing pertaining to the agreement having to do with the execution of the notes and, for that reason, plaintiff's exhibit 14 was competent. Moreover, it was executed prior to the indictment of the defendant as receiver and was made at or about the time of the alleged agreement. A copy of this agreement was mailed to the defendant within a day or two after

it had been reduced to writing by the president of the company and was received by the defendant and produced by him at the trial upon demand by the plaintiff. It was not necessary that it should have been signed by him if, as a matter of fact, it was accepted as part of the agreement under which the notes were executed. Miers v. Chas. H. Fuller Co., 167 Ill. App. 49.

Where there is more than one instrument or document in writing, they should be considered together for the purpose of arriving at the intention of the parties in regard to any agreement between them. Meyer v. Illinois Life Ins. Co., 211 Ill. App. 285; Sullivan v. Spaniol, 78 Ill. 135. The two contracts in the case at bar related to the same subject-matter and should have been jointly considered by the trial court in arriving at its finding.

The document of April 1, 1930, entitled, "Memorandum" was not introduced in evidence, but an offer was made by the plaintiff. Therefore, it is not before us.

In our opinion the judgment of the Municipal Court should be reversed and the cause retried and for that reason and other reasons herein expressed, the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL,, P.J. AND HEBEL, J. CONCUR.

26476

GEORGE L. HOLLOWAY,

Appellee,

v.

FRANCIS O. MOLINE, JOHN GRIFFITHS AND SON COMPANY, a Corporation, ILLINOIS IMPROVEMENT AND BUILDING CORPORATION, a corporation,

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JOHN GRIFFITHS AND SON COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

272 I.A. 613

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action in the Superior Court to recover damages for personal injuries sustained on or about March 20, 1930, in the City of Chicago, while he was a pedestrian upon one of the streets of said city. From the facts it appears that while he was walking along the sidewalk a wagon tipped over and certain building material was jolted out and fell upon the foot of the plaintiff.

The original declaration filed in the cause charged that Francis O. Moline, the owner of the truck, was negligent and it was due to his negligence that the plaintiff was injured in the manner stated. In April, 1932, plaintiff filed an amended declaration making John Griffiths and Son Company, a corporation, and Illinois Improvement and Building Corporation additional defendants. This amended declaration consisted of three counts.

The first count charged that the Illinois Improvement and Building Corporation retained the defendant John Griffiths and Son Company to construct a building located at or near 5 North La Salle street in the City of Chicago, and in the process of the construction of the building employed one Francis O. Moline to carry material from and to said building; that it became the duty

Opinion filed Oct. 20, 1922

M. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

PLAINTIFF brought his action in the Superior Court to recover damages for personal injuries sustained on or about March 20, 1920, in the city of Chicago, while he was a pedestrian upon one of the streets of said city. Upon the trial it appears that while he was walking along the sidewalk a wagon slipped over and certain building material was jarred off and fell upon the head of the plaintiff.

The original declaration filed in the cause charged that Francis C. Rolins, the owner of the truck, was negligent and it was due to his negligence that the plaintiff was injured in the manner stated. In April, 1922, plaintiff filed an amended declaration making John Griffiths and Son Company, a corporation, and Illinois Improvement and Building Corporation additional defendants. This amended declaration consisted of three counts.

The first count charged that the Illinois Improvement and Building Corporation required the defendant John Griffiths and Son Company to construct a building located at or near 5 South Dalle street in the city of Chicago, and in the process of the construction of the building employed one Francis C. Rolins to carry material from and to said building; that it became the duty

of Moline himself and by his servants to exercise ordinary care in the management of a certain automobile or motor vehicle used in conveying said material; charges further that it became the duty of the two defendants, Illinois Improvement and Building Corporation and John Griffiths and Son Company, through themselves and their servants, while in the construction of said building to keep the entrance to the building and the sidewalk adjoining thereto, clear of any holes, broken boards or other substance, so that motor trucks in driving alongside of said building might not drive into said holes, but that the defendants failed in this duty and, as a result thereof, while plaintiff was walking along the sidewalk on Madison street adjacent to said building, he was injured because of the negligence of the defendants and particularly the negligence of the defendant Moline in carelessly and improperly operating his automobile so that it ran into said hole, causing certain material to fall off of the same and against the plaintiff.

The second count charges that the Illinois Improvement and Building Corporation owned and operated the building which was then and there in the process of construction and that the John Griffiths and Son Company, being retained as said contractor, employed and retained Francis O. Moline to haul and deliver materials. Then follows the allegations that the Illinois Improvement and Building Corporation and the defendant John Griffiths and Son Company, permitted the holes to be and remain at the entrance to the building.

The third count is practically the same as the second in that it charges that John Griffiths and Son Company employed Moline to haul and deliver materials and it was the duty of the two defendants Illinois Improvement and Building Corporation and John Griffiths and Son Company to keep the entrance to said building in a safe condition and not permit holes or broken boards at the entrance so that motor trucks could enter the building safely and not capsize.

of making himself and by his servants to exercise ordinary care in the management of a certain automobile or motor vehicle used in conveying with materially storage further that it was the duty of the defendants, Illinois Investment and Building Corporation and John Griffith and Son Company, through themselves and their servants, while in the construction of said building to keep the premises in the building and the sidewalk adjoining thereon clear of any holes, broken boards or other obstacles, so that motor trucks in driving alongside of said building-site not drive into said holes, but that the defendants failed in this duty and, as a result thereof, while plaintiff was walking along the sidewalk in Madison street-adjacent to said building, he was injured because of the negligence of the defendants and particularly the negligence of the defendant Illinois in carelessly and improperly operating his automobile so that it was into said hole, causing serious material to fall off of the grade and against the plaintiff.

The second count charges that the Illinois Investment and Building Corporation owned and controlled the building which was then and there in the process of construction and that the defendants John Griffith and Son Company, being retained as sub contractor, employed and retained trucks to haulm to haul and deliver material. That defendant the plaintiff-alleges that the Illinois Investment and Building Corporation and Griffith and Son Company, negligently permitted the holes to be and remain in the sidewalk in the building.

The third count is practically the same as the second in that it charges that John Griffith and Son Company employed trucks to haul and deliver material and it was the duty of the two defendants Illinois Investment and Building Corporation and John Griffith and Son Company to keep the premises to said building in a safe condition and not permit holes or broken boards at the entrance so that motor trucks could enter the building safely and not overturn.

Upon the trial of the cause the defendant Illinois Improvement and Building Corporation was dismissed out of the case and the jury found the defendant Francis O. Moline not guilty and John Griffiths and Son Company guilty and assessed damages and judgment was entered upon the verdict.

The plaintiff testified that he was five or six feet from the entrance and upon the sidewalk when the tile fell from the truck.

A witness by the name of Gerbitz who was with the plaintiff at the time of the accident testified that they were walking east on Madison street, on the north side of the street, and that he saw the tile fell off the wagon and strike Holloway on the foot; that there was a hole in the pavement and that he noticed the front wheel of the truck as it went into the hole; that the truck swayed and the tile fell off; that the hole was about 3 feet from the curb and the accident occurred about 15 feet west of the entrance to the building.

Moline, the defendant, called as a witness by the plaintiff, testified that he was not driving the truck at the time the accident happened and did not know who was doing the contract work on the building at that time; that he Moline had a contract with the Rockwell Lime Company, and not with John Griffithsand Son Company, for the hauling of brick; that he believed that John Griffiths and Son Company had the general contract and that Griffiths was putting up the building so far as he knew, but that he did not know except that there was a wooden sign with the name John T. Griffiths and Son on it.

At the close of plaintiff's case the defendant John Griffiths and Son Company requested the court to instruct the jury to find it not guilty, which was refused.

The witness Hilger testified on behalf of the defendants

Upon the trial of the cause the defendants Hillmann Brothers and Sterling Engineering are discharged but if the men the jury found the defendant Lindsay - Miller Inc guilty - were renewed Gonzales and Jaramillo was ordered upon the verdict.

The plaintiff testified that it was five or six feet from the entrance and upon the sidewalk when the tile fell from the truck.

A witness by the name of Garcia who was with the plaintiff at the time of the accident testified that they were walking west on Gaskins street, on the north side of the street, not that he was the tile fell off the roofs and crashed violently on the land that there was a hole in the pavement and that he kicked the front wheel of the truck as it went into the hole; that the truck veered and the tile fell off; that the hole was about 2 feet from the curb and the accident occurred right in front west of the entrance to the building.

Helen, the defendant, called as a witness by the plaintiff, testified that he was not driving the truck at the time the accident happened but it was that was driving the accident was on the building at that time; that he Miller had a contract with the roofing like company, and not with John Brillhamer and Company; the building at issue; that he believed they John Brillhamer and Company and the general workers had been installed and (writing up the building so far as he knew, but that he did not know where that there was a window sign with the name John R. Brillhamer and Co.

At the close of plaintiffs case the defendant John Brillhamer and Co moved for a directed verdict in favor the jury to find it not guilty, which was refused.

The witness Hillmann testified on behalf of the defendants

that he was the driver of the wagon which was hauling the tile to the building; that there was a hole in the street about 3 or 4 feet from the entrance which was about 8 inches deep and 3 or 4 feet wide; that he did not know what the hole was for but guessed it was because of some plumbing which had been done; that the hole was 3 or 4 feet from the sidewalk; that he was employed by Moline and that when he came to the building he got orders from Griffith's men as to where to put the load.

George James, a witness called on behalf of the defendant John Griffiths and Son Company, testified that he was a watchman for that company; that the sidewalk was new and planks were laid over the sidewalk so that trucks could run into the building; that these planks came down to the edge of the sidewalk and on both sides there was a ramp built out each way from the planks; that he saw the truck come from the east and out in toward the building; that the plumber had dug a hole in order to put in a water or fire plug; that the depression was 3 or 4 feet from the sidewalk and close to the ramp; that this work was not done by John Griffiths and Son Company; that the plumbing work had been done probably a couple of weeks before the accident.

From the evidence it would appear that the hole which caused the accident was located in the street and not at the entrance erected by the defendant. It is also apparent from the testimony that neither of the defendants, Illinois Improvement and Building Corporation nor the John Griffiths and Son Company was liable because of the negligence of the driver of the truck. The charge in the declaration that Moline was employed by either of these two defendants is not supported by the evidence. Moline appears to have been working for and employed by the Rockwell Lime Company and there is nothing in the evidence connecting this Company with John Griffiths

& Son Company, except the fact that it was delivering the goods and material to the building in question.

The responsibility of John Griffiths and Son Company, if any exists, depends on the question as to whether or not the depression or hole in the street, which caused the tilting of the truck, was brought about or created by its act.

The declaration in the first instance charged the Illinois Improvement and Building Corporation with being in the process of constructing the building and that it retained the defendant John Griffiths and Son Company, a corporation, to do the work. There is no evidence in the record to the effect that John Griffiths and Son Company was in full control of construction. If it were acting for the defendant, Illinois Improvement and Building Corporation, as an agent and not as an independent contractor, there may or may not have been a liability, depending entirely upon the facts. The fact that there was a sign on the edge of the building would not be sufficient to fix the responsibility. If, as a matter of fact, the depression was in a public street in front of and adjacent to the premises and not under the control of the defendant John Griffiths and Son Company, then there would be no liability unless this depression or hole in the street was brought about by reason of the action of the aforesaid defendant. The fact that someone stated that there had been some plumbing work done which necessitated the removal of the pavement, is too vague and uncertain to fix a liability upon the defendant. Smith v. Rutledge, 332 Ill. 150; Ayers v. City of Chicago, 111 Ill. 406.

In view of the uncertainty of the evidence, we are of the opinion that a new trial is necessary and for that reason the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND HEBEL, J. CONCUR.

a fine concern, except the fact that it was delivering the goods and material to the building in question.

The responsibility of John Griffiths and Son Company, if any exists, depends on the question as to whether or not the excavation or hole in the street, which caused the killing of the horse, was brought about or created by its act.

The declaration in the first instance charged the Illinois Improvement and Building Corporation with being in the process of constructing the building and that it retained the defendant John Griffiths and Son Company, a corporation, to do the work. There is no evidence in the record to the effect that John Griffiths and Son Company was in fact engaged in construction. It is true during the delivery, Illinois Improvement and Building Corporation, in its agent had set up an independent contractor. Under no circumstances does a liability exist upon the first. The fact that there was a sign on the edge of the building would not be sufficient to fix the responsibility. It, as a matter of fact, the excavation was in a public street in front of and adjacent to the premises and not under the control of the defendant John Griffiths and Son Company, then there would be no liability unless the excavation or hole in the street was brought about by reason of the action of the defendant. The fact that a passage-ways had been made through such line which necessitated the removal of the pavement, is not enough and contrary to fix a liability upon the defendant. Chicago v. Sheldon, 171 Ill. 479; Moore v. City of Chicago, 111 Ill. 494.

In view of the inevitability of the evidence, as to of the opinion that a new trial is necessary and for that reason the judgment of the Superior Court in reversed and the cause remanded for a new trial.

Reversed and remanded.

McCA, P.J. and McGIL, J. concur.

36945

PROVIDENCE INSTITUTION FOR SAVINGS, a corporation,

Complainant - Appellee,

v.

MILDRED J. DAVIDSON, et al,

Defendants - Appellants.

INTERLOCUTORY APPEAL

FROM THE SUPERIOR

COURT, COOK COUNTY.

272 I.A. 613

Opinion filed Oct. 25, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The complainant, Providence Institution for Savings, a corporation, filed its bill praying for foreclosure of a trust deed upon certain real estate. December 2, 1932, an order was entered appointing a receiver for the property, which order was reversed by this court, as set forth in opinion No. 36611, for lack of sufficient notice to owners of the equity. The defendants filed an answer to the bill and a second motion for a receiver was made and the matter is before us on the sole question as to whether or not the premises were adequate security for the amount alleged to be due.

It appears from this evidence that the total amount of indebtedness, including principal, interest and taxes, amounted to $57,000. This amount is $12,000 in excess of the value of the property as found by the court.

Defendants insist that the proper method of computing values in view of the present demoralized market in Chicago, is for the court to capitalize the net income rather than to adopt the opinion of experts as to the actual values.

Based upon the testimony of the defendant Anna B. Augustus, who had been managing the property for several years, the net income, after paying interest on the mortgage, amounted to $1,136.38. It appears from the record, however, that there was considerable dispute as to the amount of rentals paid and no receipts for rentals were produced upon request.

Opinion filed Oct. 26, 1920

Mr. Justice Brown delivered the opinion of the court.

The appellant, Independent Institution for Savings, a corporation, filed its bill praying the foreclosure of a trust deed upon certain real estate. December 1, 1917, in order not thereby complicating a mortgage for the creditor, which other was previously by this court, it was then in existence on, 1921, the bank of Kentucky United States to secure of the county. The defendant, filed in answer to the bill and a cross motion for a receiver was sent out the judge to believe as at the time specified in to which is not the judgment was absolute property for the cross claimed by in its.

It appears from this evidence that the bank owned of indebtedness, including principal, interest and costs, amounted to 18,000. This amount is 18,000 in excess of the value of the property in front of the court.

Appellants claim this the proper method of ascertaining value is what of the income conservative method in Illinois, in fact the court to capitalize the net income rather than to study the relation of objects as to the actual value.

Based upon the testimony of the defendant John S. Augustus, who had been managing the property for several years, it was known, after paying interest on the mortgage, amounted to $1,128.00. It appears that the rental, however, has been considerable in excess of the amount of rentals paid and no receipts for rentals were produced upon trial.

Witnesses for the complainant fixed the value of the property between $36,000 and $42,450. This was computed both on the physical and economic value of the property.

The complainant owned the first mortgage on the premises here involved and in the trust deed the rents, issues and profits were pledged as additional security and provision is made for the appointment of a receiver in case of default. There appears to have been a default of the principal and interest and a default in the payment of taxes running back three years.

The court having heard testimony as to the value of the premises and the income derived therefrom and with knowledge of the defaults as hereinbefore enumerated, was of the opinion that a receiver should be appointed to protect the interests of the complainant. Under such circumstances a court of review is reluctant to disturb the finding of the court below. The chancellor having appointed a receiver in this cause pendente lite and that being a matter resting largely within the discretion of the chancellor, that order will not be disturbed unless there appears to have been a clear abuse of the power of the chancellor in the appointment. Finding no such abuse of discretion by the chancellor, the order of the Superior Court appointing a receiver pendente lite is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

36989

THE LINCOLN NATIONAL LIFE INSURANCE CO.,
Appellee,

vs.

PHILIP STAMLER and SARAH STAMLER,
Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

272 I.A. 613

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant owners from an order entered June 14, 1933, vacating and setting aside a prior order entered April 4, 1933, (which denied the motion of complainant for the appointment of a receiver) and appointing a receiver for the premises described in the bill of complaint.

The bill of complaint was filed March 1, 1933, to foreclose a trust deed executed and delivered November 24, 1930, whereby certain premises in Chicago, Cook county, were conveyed to secure the payment of nine principal promissory notes for the aggregate sum of $45,000 with interest at six per cent. The bill alleged defaults in the semi-annual interest due January 16, 1933, to the amount of $1320, principal note No. 3 to the amount of $1000 due January 16, 1933, the general taxes assessed against the premises for the year 1929 to the amount of $1399.49 (of which $578.48 had been paid on account), the general taxes for the year 1930 to the amount of $1427.92. It alleged that the premises, which were known as 4653 North Lawndale avenue and as 3653 Leland avenue, consisted of a lot 100 feet by 125 feet and were improved with two three story buildings, each containing six apartments of five rooms and one basement apartment of four rooms, and a two-car brick garage; that the then market value of the premises was less than $45,000; that "said premises are scant security for the indebtedness owed by your Orator;" and prayed for the appointment of a receiver as provided in the terms of the trust deed. The bill was duly verified by Raymond H. Greble as agent for complainant.

Before

THE [illegible] ELECTRIC LIGHT COMPANY [illegible]

[illegible]

vs.

[illegible] STREET STRAIGHT [illegible] RAILWAY COMPANY,
[illegible]

[illegible]

[illegible]

This is an appeal by defendant errors from an order entered June 14, 1923, enjoining and [illegible] a city [illegible] entered April 7, 1923, [illegible] the [illegible] of [illegible] for the [illegible] of a receiver and [illegible] a receiver for the property described in the bill of complaint.

The bill of complaint was filed June 1, 1920, by Tremayne & Lyon, doing business in [illegible], [illegible] corporation [illegible] in [illegible], [illegible] [illegible] to recover the amount of rice principal [illegible] for the aggregate sum of $42,000 with interest at six per cent. The bill alleged defaults in the semi-annual interest due January 1, 1920, in the amount of $1,050, principal note No. 3 in the amount of [illegible] due January 1, 1922, the general taxes assessed against [illegible] for the year 1920 in the amount of $1,820.45 (of which $[illegible] had been paid on account), the general taxes for the year 1921 in the amount of $1,277.02. It alleged that the premises, which were known as 2025 North Lincoln avenue and 2028 Lincoln avenue, consisted of a lot 100 feet by 125 feet and were improved with the three story brick-[illegible], [illegible] containing six apartments of five rooms and one basement apartment of four rooms, and a two-car [illegible]; that the then market value of the premises was less than $[illegible]; that "said premises are very nearly worthless for the purposes for which they were [illegible] and prayed for the appointment of a receiver as provided in the terms of the lease here. The bill was duly verified by Jerome T. [illegible] on oath for complainant.

Defendants answered averring that the provisions of the trust deed for prompt payment had been waived; that they had offered to pay part of the indebtedness that fell due January 16, 1933, and the balance at a future date as had been previously done, but complainant, to the great surprise of defendants, without previous notice filed its bill to foreclose. They denied that they had made default in payment of $1000, averring that complainant had agreed to extend that sum from January, 1933, to January, 1936. They denied that the then market value of the premises was less than $45,000, and denied that the premises were scant security for the indebtedness, or that unless a receiver was appointed the interest of complainant would be greatly impaired, and declared that a receiver was unnecessary. The answer further states: "These defendants aver that the value of the property even under the present depressed financial conditions is appraised to be in excess of $60,000 although defendants have paid for said property the sum of $85,000."

The answer further avers that defendants are in possession and are maintaining and preserving each and every apartment; that with one or two exceptions they have succeeded in obtaining a selected class of tenants and fear that the tenants will be disturbed and the income diminished should a receiver be appointed. The answer denies that there is an unpaid balance of the 1929 taxes but states that defendants have deposited with the authorized agent of complainant a sum of money sufficient to cover the balance of the unpaid taxes for 1929; further, that the 1930 taxes are now being litigated in the County court on account of the excessiveness of the amount taxed, and that defendants will arrange to pay the amount adjudged by the court at the conclusion of the hearing.

Upon the hearing of a motion for a receiver the court on April 4, 1933, entered an order reciting that "evidence and argument of counsel had been heard and that the motion is hereby denied until

Defendants answered arguing that the provisions of the trust deed for proper payment had been waived; that they had offered in any part of the indebtedness that fell due January 15, 1932, and the balance at a future date as had been previously done, but complainant, in the great surplus of defendants, without previous notice filed the bill to foreclose. They denied that they had made default in payment of 1929, averring that complainant had agreed to extend that one from January, 1931, to January, 1932. They denied that the sum entire value of the premises was less than $18,000, and denied that the premises was always security for the indebtedness, or that unless a receiver was appointed the interest of complainant would be greatly impaired, and denied that a receiver was necessary. The answer further avers: "These defendants aver that the value of the property even under the present depressed financial conditions is appraised to be in excess of $20,000 although defendants have paid for said property the sum of $18,000."

The answer further avers that defendants are in possession and are maintaining and preserving such and every apartment; that with one or two exceptions they have succeeded in obtaining a reasonable class of tenants; that the tenants will be disturbed and the income diminished should a receiver be appointed. The answer denies that there is an outside balance of the $18,000 loan; that defendants have complied with the mortgagee's grant of extension; and a lot of money sufficient to cover the balance of the unpaid taxes for 1930; further, that the 1929 taxes are now being liquidated in the timely manner in accordance of the agreement. The amount taxes, and that defendants will attempt to pay the amount adjudged by the court as the conclusion of the hearing.

Upon the hearing of a motion for a receiver the court on April 4, 1932, entered an order granting that "pleadings and arguments of counsel had been heard and that the motion is hereby denied until

after sale showing deficiency."

June 9, 1933, complainant filed a petition in which it averred that certain facts had come to its attention subsequent to the entry of this order, namely, that twelve of the apartments on the premises in question were equipped with electric ice-boxes; that these were Frigidaire ice-boxes sold on contract by the Stover Co.; that defendants were delinquent in payments on same, and that complainant was informed by the Stover Co. that unless these delinquencies were made up or assurance given to it, it would cancel the contracts and remove the ice-boxes.

The petition averred that this equipment was essential to the maintenance of the premises as an apartment building; that if the equipment was removed from the premises it would cause an infraction of the existing leases which would result in the loss of the tenants now occupying the premises and greatly reduce the value of the property, to the detriment of all parties having an interest in the suit; that the petition therefore prayed that an order be entered vacating the previous order which refused the appointment of a receiver, and that a further order be entered appointing a receiver for the premises. This petition was duly verified.

Defendants answered asserting that the facts as to the Frigidaires were known to complainant at the time of the former hearing; that the contracts for the purchase of the Frigidaires were executed long after the date of the execution of the mortgage in question; that the payments required each month by the contract had been made but not exactly on the due date; that the Stover Co. had accepted the payments and never complained; and that they had paid on account of the sales contract over $1000. They denied that they were delinquent to the extent alleged; and further stated that on account of the seasonable decorating work done on the flats and other expenses, the Stover Co. had accepted payments in lesser amounts; that they intended to keep up the payments until the full

after such starting defaulting.*

June 4, 1919, supplement that a petition in which it averred that certain facts had come to its attention subsequent to the entry of this order, namely, that twelve of the apartments on the premises in question were equipped with electric ice-boxes; that these were frigidaire ice-boxes sold on contract by the Stover Co.; that defendants were delinquent in payments on same, and that complainant was informed by the Stover Co. that unless these delinquencies were made up or assurance given to it, it would remove the machinery and secure the ice-boxes.

The petition averred that this equipment was essential to the maintenance of the premises as an apartment building; that if the equipment was removed from the premises it would cause an interruption of the existing leases which would result in the loss of the tenants now occupying the premises and greatly reduce the value of the property, to the detriment of all parties having an interest in the suit; that the petition therefore prayed that an order be entered vacating the previous order which released the appointment of a receiver, and that a further order be entered appointing a receiver for the premises. This petition was duly verified.

Defendants answered averring that the facts as to the frigidaires were known to complainant at the time of the former hearing; that the contracts for the purchase of the frigidaires were executed long after the date of the execution of the mortgage in question; that the payments required each month by the contract had been made but not exactly on the due date; that the Stover Co. had accepted the payments and never complained; and that they had paid on account of the sales contract over $1000. They denied that they were delinquent in the other allegations; and further stated that on account of the reasonable decorating work done on the flats and other expenses, the Stover Co. had accepted payments in lesser amounts; that they intended to keep up the payments until the full

purchase price was paid, although the Stover Co., through its representative, indicated that it will agree to reduce the monthly payments to $37 a month, and they assured the court that they would make their payments regularly. Defendants stated that the Stover Co. had not given them any notice of forfeiture at any time or served any notice of delinquency; that as a matter of fact it never seriously complained about not receiving monthly payments nor about the time of the making of the payments. They denied that the Frigidaires will be removed from the building as stated; that complainant in its efforts to appoint a receiver was trying to incite the prejudice of the Stover Co. against them. They asked that the prayer of the petition be denied. This answer is duly verified by both defendants.

Defendants argue here that the denial of the motion for the appointment of a receiver on April 4, 1933, was an adjudication of that point which operates as a bar to its renewal in the same proceeding unless additional grounds for the appointment of a receiver are alleged and proved. They cite Parrott v. Hodgson, 46 Ill. App. 232; Leigh v. Laughlin, 130 Ill. App. 530, and other cases. An order for the appointment of a receiver pendente lite, however, is a mere interlocutory order, and while the fact that it has been passed upon should undoubtedly receive due consideration upon any subsequent similar motion in the same proceeding, it does not operate as a bar and does not limit the jurisdiction of the chancellor. Davis v. Blair, 252 Ill. App. 417; Kelly v. Marks, 267 Ill. App. 199.

Notwithstanding the defaults which existed and notwithstanding the fact that the trust deed provided that a receiver might be appointed in case of default, the power of the court in that respect is not arbitrary and should be exercised only where the court is satisfied that there is imminent danger of loss if is is not exercised. Moreover, the burden is upon the party applying for a

[illegible] [illegible] was paid. Although the figures [illegible], however, the representative, indicated that it will agree to reduce the monthly payments to $27 a month, and they assured the court that they could make their payments regularly. Defendants claim that the [illegible] Co. had not given them any notice of foreclosure at any time or served any notice of delinquency; that as a matter of fact it never seriously complained about not receiving monthly payments nor about the time of the making of the payments. They denied that the fixtures will be removed from the building as stated; that complainant in his efforts to appoint a receiver was trying to locate the president of the [illegible] Co. [illegible] that the [illegible] of the petition is false. This answer is duly verified by both defendants.

Defendants argue [illegible] the denial of the motion for the appointment of a receiver on April 1, 1938, was an adjudication of that point which operates as a bar to the renewal in the same proceeding unless additional grounds for the appointment of a receiver are alleged and proved. They cite Barrett v. Halpern, 4a Ill. App. 478; Lamb v. Lamb, 1a Ill. App. 880, and other cases. An order for the appointment of a receiver terminates life, however, in a more interlocutory order, and while the fact that it has been passed upon should authoritatively resolve the controversy upon any subsequent effort within the same proceeding, it does not operate as a bar and does not limit the jurisdiction of the chancellor. Davis v. Miller, 320 Ill. App. 417; Kelly v. Martin, 327 Ill. App.198.

Notwithstanding the defendants which relied not [illegible] the fact that the trust deed provided that a receiver might be appointed in case of default, the power of the court in that respect is not arbitrary and should be exercised only where the court is satisfied that there is imminent danger of loss if it is not exercised. However, the burden is upon the party applying for a

receiver to show that there is danger of loss from neglect, waste, misconduct or insolvency. This court so held in Frank v. Siegel, 263 Ill. App. 316. Under the rule there announced we hold the order appointing this receiver was not justified. In the first place, the allegations as to the value of the premises are vague and indefinite, and these were apparently overcome by the evidence introduced at the first hearing. It is significant that the order then entered recited that the court heard the evidence, while in the order entered in the hearing held on the petition filed June 9th, there is no such recital. The findings of the last named order are also vague and indefinite. It does not appear therefrom at what time, if any, defendants promised that the defaults would be cleared up, while it affirmatively appears from the record that the taxes have been now provided for. We are not unaware of the rule that it is not necessary that the order recite the facts, provided the evidence in the record supports the order. (Central Trust Co. v. McGurn, 257 Ill. App. 45), but the facts which here appear with reference to the value of the property are wholly insufficient to establish, in our opinion, that the premises conveyed are scant security for the debt. The refrigerators were no part of the original security and any delinquencies with respect to payment therefor seem to have been waived by the company from which the same were purchased.

The order appointing a receiver was not justified on this record, and it will be reversed.

REVERSED.

McSurely and O'Connor, JJ., concur.

Receiver to show that there is danger of loss from neglect, waste, misapplied or improvidency. This court so held in Frank v. Sigrist, 197 Ill. App. 111. Under the rule there announced we hold the order appointing a receiver was not justified. In the first place, the allegations as to the value of the premises are vague and indefinite, and there was absolutely evidence by the creditors interested at the first hearing. It is elementary that the court must relyeed upon reliable evidence as to the existence, while in the matter wherein in the hearing held on the petition filed June 9th, there is no such reliel. The findings of the last hearing after are also vague and indefinite. It does not support authority at that time, if any, defendants asserted that the liability would be disputed by, while it affirmatively appears from the record that the terms have been paid prior thereto. We are not unmindful of the rule that it is not necessary that the order recite the issues, provided the evidence in the record supports the order. (Sprague Trust Co. v. Kuhner, 287 Ill. App. 46), but the facts which have support with reference to the value of the property are wholly insufficient to establish, in our opinion, that the premises conveyed are much invalid for the debt. The relationship even on part of the original security and our disinterested mind impart to payout thereof seem to have been waived by the company from which the same were purchased.

The order appointing a receiver was not justified on this record, and it will be reversed.

REVERSED.

Barrett and O'Connor, JJ., concur.

85

36325

PAUL E. FLEMING,
Appellant,

vs.

LUCIA A. WARD,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

272 I.A. 613

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

I. This cause was before this court on a former appeal (Fleming v. Ward, 249 Ill. App. 649) where an order, which sustained a demurrer to the second amended bill and dismissed the same for want of equity, was reversed and the cause remanded. This appeal is from a decree entered July 11, 1928, overruling exceptions of complainant to the report of a master, dismissed the bill of complaint for want of equity.

The original bill of complaint was filed January 22, 1923, and as amended averred that certain deeds executed by complainant on July 27, 1911, which conveyed certain premises in Chicago known as the Ellis avenue and Minerva avenue properties to John E. Ward were in fact mortgages. The bill prayed for an accounting and for leave to redeem.

The answer denied that complainant ever was the owner of the properties, averred that the same belonged to John E. Ward, to whom the deeds were delivered, and set up that defendant, Lucia A. Ward, was the wife of said John E. Ward, now deceased, and that the deeds were executed in settlement of matters growing out of certain joint adventures in which complainant and said John E. Ward had been engaged; that concerning these matters suits were then pending which were by agreement dismissed pursuant to the settlement. The answer expressly denied that any oral agreement had been made whereby the deeds were to be considered as mortgages, and asserted that the alleged rights of complainant had been adjudicated against him in

BETWEEN

JOHN E. FLORENCE,

Respondent,

vs.

LUCIA E. WARD,

Appellee.

APPEAL FROM DECREES OF
DIVORCE OF THE COURT.

272 I.A. 613

MR. JUSTICE DUFFY DELIVERED
THE OPINION OF THE COURT.

1. This cause was before this court on a former appeal (Florence v. Ward, 98 Ill. App. 221) where it appeared a decree in the second chancery bill, and dismissed the same for want of equity, our reversal was for error therein. This appeal is from a decree entered July 11, 1907, overruling exceptions of complainant to the report of a master, dismissed the bill of complaint for want of equity.

The original bill of complaint was filed January 10, 1907, and as amended sworn to March 1st, 1907, alleges marriage of complainant to defendant, July 17, 1903, under assumed names in Chicago, and the bill asserts and alleges improper conduct in June 5. that was in fact adultery. The bill charges for an accounting and for costs in arrears.

The master found that complainant was the owner of the properties, overruled that the same belonged to John E. Ward, it when the goods were delivered, and set up that defendant, Lucia E. Ward, was the wife of said John E. Ward, now deceased, and that the goods were purchased by complainant at stores frequented by of certain jewel associations in which complainant and said John E. Ward had been engaged; that immediately these activity while were then working which were by attorneys mistaken therein in the settlement. The master expressly denied that any such agreement had been made whereby the goods were to be transferred to defendant, and asserted that the alleged rights of complainant had been adjudicated against him in

other litigation and that complainant was estopped from asserting his claim by laches.

The controlling question to be determined is whether the allegation that these deeds were in fact mortgages is established by the evidence in the record. Some preliminary questions, however, arise on the record.

II. As already stated, defendant, Lucia A. Ward, is the widow of John E. Ward, with whom the transactions concerning which complainant brings suit, took place. John E. Ward died testate, a citizen of South Dakota, on August 4, 1922. His will, duly probated in South Dakota, bequeathed one dollar to each of five persons named and bequeathed and devised all the rest, residue and remainder of his estate to defendant, and defendant contended upon the trial and averred in a supplementary answer that she was defending the suit brought by complainant as legatee of John E. Ward, and that complainant was therefore an incompetent witness under the statute to testify concerning the transactions which took place between him and John E. Ward prior to Ward's death. This contention was sustained, and such evidence offered by complainant was excluded. This ruling is assigned as error and is the principal preliminary question which must be determined. The point requires a construction of section 2 of the Evidence act (Cahill's Ill. Stats. 1933, chap. 51, sec. 2) which in part provides:

> "No party to any civil action * * * shall be allowed to testify therein * * * in his own behalf * * * when any adverse party * * * defends as * * * heir * * * or devisee of any deceased person."

Complainant contends that Mrs. Ward defends this suit not as a legatee under the will of John E. Ward but as a grantee named in two deeds executed by John E. Ward November 30, 1917, and recorded in Cook county, Illinois, August 7, 1922, which purported to convey the said premises to Lucia A. Ward.

The original bill in this case was filed January 22, 1923,

other litigation and that consideration was removed from executing the claim by James.

The remaining questions to be determined by whether the defendants that there doubt exists in fact sufficiently is established by the evidence in this record. Some preliminary questions, however, arise on the record.

II. As already stated, Jefferson, Lewis & Ward, in the place of John E. Ward, with whom the transactions concerning which complaint makes well, had dissolved. John E. Ward died intestate, a citizen of Lewis County, on August 6, 1898. His estate, duly was heard in Probate Court, represented was valued to each of five persons named and bequeathed and devised all the rest, residue and remainder of his estate to defendant, and defendant contended upon the trial and asserted in a unanimously manner that she was informing the well brought by complainant as legatee of John E. Ward, and that complainant was barred or incompetent witness under the statute by actually overhearing the transaction with John Fairchild and John E. Ward prior to Ward's death. This contention was made claimed, and such evidence offered by complainant was excluded. This ruling is assigned as error and is the principal question by consideration which must be determined. The point requires a construction of section 2 of the Probate and Limitation Act. Stats. 1901, chap. 83, sec. 2) which in part provides:

> "No party to any civil action or a suit by interest in equity shall be an adverse party or action of any deceased person."

Complainant maintains that she, that defendant claim that was as a legatee under the will of John E. Ward and as a creditor filed the bill claimed by John E. Ward December 24, 1897, and per sented in their behalf, filed Jan. 7, 1898, which proceeding is adverse the said proceeds to John E. Ward.

The original bill in this case was filed January 22, 1898,

and complainant did not in and by that bill sue Mrs. Ward as devisee under her husband's will. The bill alleged that deeds from John E. Ward to his wife, Lucia A. Ward, recorded August 7, 1922, were, as complainant was informed and believed and so stated the fact to be, delivered prior to the death of said John E. Ward.

The second amended bill filed November 9, 1927, alleged the execution of these warranty deeds by John E. Ward on November 30, 1917; that the same were recorded in Cook county, Illinois, on August 7, 1922; that the premises were conveyed by these deeds to Lucia A. Ward without consideration given by her; that the conveyances were gratuitous; that Lucia A. Ward at that time had notice of the rights of complainant and had notice that John E. Ward held an undivided one-half interest in and to the premises as security only for the payment of certain notes of complainant, which notes, the bill averred, were on November 30, 1917, assigned by John E. Ward to Lucia A. Ward. The second amended bill also alleged that John E. Ward was in possession of the premises and collected the rents and profits thereof from July 27, 1911, to November 30, 1917, and that Lucia A. Ward had been in possession of the premises from November 30, 1917, up to the time of the filing of the bill, collecting the rents and profits.

Defendant filed her answer October 3, 1928, denying any notice of any alleged rights of complainant but admitting that the notes made by complainant "were transferred to her by the will of her deceased husband," and that she had brought suit upon them. In the 5th paragraph of the answer she admitted that she was the wife and widow "and obtained title to said premises involved herein upon the death of said John E. Ward." This answer nowhere further discloses through what means or from what source she claimed to have obtained her title to the premises.

and conditions did not in any by that will was due, then, in the view upon her husband's will. The bill alleged that deeds from John S. Ford to his wife, Laura S. Ford, recorded August 7, 1877, were in consideration was inferred and believed and on account the fact to be, delivered prior to the death of said John S. Ford.

The second amended bill filed November 5, 1917, alleged the execution of those warranty deeds by John S. Ford on November 30, 1917; that the same were recorded in book money, Illinois, on August 7, 1878; that the premises were conveyed by Laura Ford to Laura L. Ford without consideration given by her; that the conveyances were gratuitous; that Laura S. Ford at such time had notice of the rights of complainant and matters that John S. Ford held the premises as security for a certain indebtedness to her in the premises as security only for the payment of certain notes of complainant, which notes, the bill averred, were on November 30, 1917, endorsed by John S. Ford to Laura S. Ford. The second amended bill also alleged that John S. Ford was in possession of the premises and maintained the place and profits thereof from July 27, 1911, to December 5, 1917, and that Laura S. Ford had been in possession of the premises from November 30, 1917, to the time of the filing of the bill, including the rents and profits.

Defendant filed her answer March 5, 1919, denying any rights of her alleged rights of indebtedness and averring that the notes held by complainant "were transferred to her by the will of her deceased husband," but that she had received no rent from the premises.

In the cross pleadings of the answer she admitted that she was the wife and widow "and distributee title to said premises involved herein upon the death of said John S. Ford." This answer further alleged that the deed of said John S. Ford, Laura S. Ford, was intended to have obtained her title to the premises,

On December 13, 1923, defendant by leave filed a supplemental answer in which she specifically denied that the deeds in question conveyed these premises, or any portion thereof, to her; denied that the alleged deeds were valid or effective conveyances, and denied that either of them passed any title to her. She averred that these deeds were never delivered to her during the livetime of John E. Ward and said that she was not informed and had no knowledge of the existence of the deeds, or either of them, during his lifetime; that she never saw or had possession of, or knew of the existence of the deeds or either of them during the lifetime of John E. Ward. She averred that the deeds were found among his papers after his death on August 4, 1922; that he never delivered or parted with the possession and control of the deeds during his lifetime and never delivered the same to her; that the deeds were still in the possession and control of John E. Ward at the time of his death and were found thereafter among his papers. She asserted that they were not, therefore, valid conveyances and did not pass any title whatsoever to her, but on the contrary averred that her title to said real estate came to her only by and through the will of John E. Ward, dated and executed on or about October 10, 1903, under and by which all the residue of his property, real, personal and mixed, was given, devised and bequeathed to her.

Upon the hearing defendant produced as a witness Harry J. Ward, not a relative but a friend of deceased, who lived in Huron, South Dakota, who testified that he maintained an office in Huron and had been engaged in the real estate and insurance business; that he did conveyancing for John E. Ward in his lifetime; that he consulted with John E. Ward in South Dakota in November, 1917, and on November 30, 1917, John E. Ward came to his office with deeds to certain property in Huron, South Dakota, and asked him to make a conveyance of each separate tract to Lucia A. Ward; that he prepared

On December 13, 1916, defendant by have right a supplemental answer in which she specifically denies that she does in question [illegible] Ford stockholders, or any partial thereof, or that [illegible] the alleged deeds were valid or effective conveyances, and denies that either of them passed any title to her. She averred that these deeds were never delivered to her during the lifetime of John E. Ford and said that she was not informed and had no knowledge of the existence of the deeds, or either of them, during his lifetime; that the letter she or had procured al, or knew of the existence of the deeds or either of them during the lifetime of John E. Ford. She averred that the deeds were found among the papers after his death on August 4, 1916; that he never delivered or parted with the possession and control of the deeds during the lifetime and never delivered the same to her; that the deeds were still in the possession and control of John E. Ford at the time of his death in a safe that therein, valid conveyances and did not pass the title whatever to her, but he the contrary retained that her title to said real estate came to her only by and through the will of John E. Ford. Defendant admitted the execution of the deeds in 1917, under and by which all the residue of his property, real, personal and mixed, was given, devised and bequeathed to her.

Upon the pleading defendant produced as a witness Mary E. Ford, and a stenoing was a friend of decedent, who lived in Kansas City, Missouri, who testified that he witnessed the signature of the deeds by the grantor in the deed which stands and [illegible] that he [illegible] for John E. Ford in his lifetime; that he was with John E. Ford in South Dakota in November, 1917, and in November 6, 1917, John E. Ford came to his office with deeds to certain property in Kansas, South Dakota, and asked him to make a memorandum of such deeds about to Linda A. Ford; that he prepared

such deeds and then John E. Ward signed them in his presence and he attached his seal and certificate and then handed them to the grantee, Mrs. Ward, in the presence of John E. Ward, and that she handed to John E. Ward a dollar in the presence of the witness; that he afterward secured from John E. Ward a description of these Chicago properties, returned to his office and wrote out deeds for these properties also. He identified the two warranty deeds produced as the ones which he made out and handed to John E. Ward, and said that John E. Ward signed them in his office but never in his presence delivered them to Mrs. Ward; that he did not see the deeds again until after the death of John E. Ward on August 4, 1928, when at the instance and request of Mrs. Ward he called at her residence and she gave him the deeds before described, conveying the South Dakota property to her, so that they might be put on record; that witness then called to the attention of Mrs. Ward the fact that deeds to the Chicago properties had also been prepared; that he then made a search among the papers of deceased for these deeds and found them in papier-mache' boxes where the rest of deceased's papers were; that the box was marked "John E. Ward--Chicago property;" that these deeds were not with the papers of Mrs. Ward but were in the box of John E. Ward; that the South Dakota deeds were in a box marked "Lucia A. Ward." The witness further testified that August 4, 1928, when he secured these deeds from among Mr. Ward's papers, he mailed them together with a two dollar fee to the recorder of deeds of Cook county, Illinois, for record.

Lucia A. Ward testified that she first saw the original of these deeds when the same came back from Chicago; that the deeds were kept in Mr. Ward's little tin box; that she was present when the deeds were taken out of the box; that Harry Ward took the deeds out of the box and that she had never seen those deeds prior to the day that he took them out and did not know of their existence and

most dearly and than John E. Ford placed them in his pressers and in
attached his most not particularly and then limited them to the
practice, are. Then, in the presence of Alva S. Ward, and then are
limited to John E. Ford a dealer in the presence of the witnesses; that
he directed another than John S. Ford a distribution of these this
map processing, returned in his office and write all these for
these processing sign. He directed the ten returning items produced
on the open which he made out and handed to John E. Ford, and said
that John S. Ford placed them in his office and never in his presence
delivered them to Ward; that he did not see the docks again
until after the death of John E. Ford on August 4, 1911, when he
the daughter and heiress of Ward. That by order of her parents and
who gave him the black leather handbag, containing the full sums
identic to her, so that her might be put on record; that it began
then relied to the attention of Ward. Ward the f.ot that death of the
Chicago processing and also read [illegible] that he then made a [illegible]
among the papers of deceased for close Ward and found them in [illegible]
handbag' before where the [illegible] of Ingersoll's papers were; that the [illegible]
was marked "John E. Ford--Chicago processing" that these docks were
not with the papers at home. Ward had been in the [illegible] of John E.
Ford; that the docks [illegible] were in a [illegible] "John E.
Ford." The signature [illegible] Ingersoll, then, when he
received these docks from [illegible], [illegible] [illegible]
together with a [illegible] for in the [illegible] of docks of this
county, Illinois, for record.

Angie A. Ward testified that she lived [illegible] the original of
these docks [illegible] from Chicago; that the docks
were kept in it. Ward's office in [illegible]; that she [illegible]
the docks were taken out of [illegible]; that Harry Ward took the [illegible]
out of the [illegible] that the [illegible] [illegible] in the
day-time by John [illegible] and [illegible] [illegible] of [illegible] [illegible]

had never heard of them. She admitted that in the course of her duties as executrix under the will she did not inventory the Chicago properties as any part of the estate of the deceased.

Mr. Ackley of Ackley Bros. Co., who were in the real estate business in Chicago and who managed these properties, collected the rents, etc., testified that the firm ran the property in the name of John H. Ward up to the time of his death.

This uncontradicted evidence shows that the deeds from John H. Ward to defendant, Lucia A. Ward, were never in fact delivered during the lifetime of John H. Ward and were therefore ineffective to pass title to Lucia A. Ward. Of the numerous cases so holding we need cite only Cline v. Jones, 111 Ill. 563; Bowen v. Bowen, 177 Ill. 409; Weisand v. Kutzelke, 253 Ill. 2[illegible]. Certified copies of the deeds in question were offered in evidence by complainant and were excluded by the court, and complainant has not argued error on this ruling.

Complainant, however, does contend that the court erred in holding that he was an incompetent witness under the statute, and seems to base his contention upon the theory that having once taken the position of a grantee, defendant is now as against complainant estopped to assert that she defends this suit as a legatee under the last will and testament of John H. Ward. He cites no case directly in point but calls attention to a number of cases in which, under certain circumstances, it was held that a defendant was estopped to take a position inconsistent with one theretofore taken where the party with whom he dealt had relied upon his representations and would be prejudiced by such reliance. Complainant says:

"We are not concerned now whether there was a valid delivery of the deeds, but whether defendant having elected to claim under the deeds and treat the delivery valid she is now estopped from raising the question."

Complainant cites cases such as Vail v. Northwestern Mutual Life Ins. Co., 192 Ill. 567; Gibson v. Brown, 214 Ill. 330; National

had never heard of them. The admitted fact is the nature of the title as described under the will and the inventory the Chicago properties as any part of the estate of the decedent.

Mr. Ashley of Ashley Bros. Co., who were in the real estate business in Chicago and who managed these properties, collected the rents, etc., testified that the firm had the property in the name of John W. Ward up to the time of his death.

This uncontradicted evidence shows that the deeds from John W. Ward to defendant, Louis A. Ford, were never in fact delivered during the lifetime of John W. Ward and were therefore ineffective to pass title to Louis A. Ford. Of the numerous cases so holding we need cite only Hinze v. [illegible], 111 Ill. 567; [illegible] v. [illegible], 177 Ill. 457; [illegible] v. [illegible], [illegible] Ill. [illegible]. Certified copies of the deeds in question were offered in evidence by complainant and were admitted by the court, and complainant has not argued error on this ruling.

Complainant, however, does contend that the court erred in holding that he was an incompetent witness under the statute, and seems to base his contention upon the theory that having once taken the position of a grantee, defendant is now as against complainant estopped to assert that he defends this suit as a legatee under the last will and testament of John W. Ward. He cites no cases directly in point but calls attention to a number of cases in which, on the doctrine of estoppel, it was held that a defendant was estopped to take a position inconsistent with one theretofore taken where the party with whom he dealt had relied upon his representations and would be prejudiced by such reliance. Complainant urges:

> "He was not concerned now whether there was a valid delivery of the deeds, but whether defendant having elected to claim under the deeds and urges his ownership under them is now estopped from raising the question."

Complainant cited cases such as Hall v. [illegible] [illegible] Co., 2[illegible] Ill. 187; Gibson v. Brown, 214 Ill. 330; Holland

Importing Co. v. Beer & Co., 324 Ill. 546; Bondy v. Samuels, 333 Ill. 535; Selman v. Geary, 334 Ill. 648; Redmond v. Gillis, 346 Ill. 223; Jackson v. Browning King & Co., 202 Ill. App. 197; Mahle v. Mahle, 211 Ill. App. 323; besides a number of cases from other jurisdictions.

We think it is quite unnecessary to discuss these cases in detail. The basis of estoppel in these cases is fraud, and the general rule is announced that where by statement or conduct a party has made a representation to another, upon which that other has relied, the party so representing may not thereafter change his position to the damage of the person relying upon his representations. In each one of these cases there devolved upon the party estopped a duty which he disregarded. That fact distinguishes all these cases from the instant case. Mrs. Ward upon the death of her husband was not obligated to disclose her defense to complainant, and she was not put to her election so far as his claims were concerned. She has an absolute right to defend as to her may seem best. She may claim under the deeds, or she may claim under the will. The decision in that regard is absolutely for her. She might claim under both the deeds and the will if she saw fit. The defenses are not inconsistent. As a matter of fact, her pleading did not disclose upon which theory she would defend up to the date she filed her supplemental answer, and complainant did not except to either of these answers. We hold the court did not err in this regard.

III. A second preliminary question is raised by complainant's contention that the court erred in refusing to reopen the case, to grant leave to file an amendment to the second amended bill, and to continue the cause for the purpose of taking depositions.

The statute of Illinois (Smith-Hurd's Ill. Rev. Stats. 1933, chap. 22, par. 37) grants authority to courts of chancery to permit amendments to bills on terms such as the court may deem proper, and it is the usual practice to grant such leave at any time during the

Lawrence Co. v. Tax Comm'n, 286 U.S. 276; Cheney v. Doherty, 286 U.S. 554; Palmer v. Ashe, 342 U.S. 134; Dodge v. Gillis, 241 U.S. 655; Taylor v. Kansas City S. Ry. Co., 200 U.S. 561; Bailey v. Alabama, 219 U.S. 219. See, 308; besides a number of cases from other jurisdictions.

It makes it is quite unnecessary to discuss these cases in detail. The basis of authority in these cases is final, and the general rule is announced that there by statutory or constitutional provisions in another, even when that other has taken place, the party so referred may not thereafter escape his position on the change of the person relying upon the representations. In each one of these cases there involved from the party subjected a duty which he disregarded. That first statutory case was from the instant case. Here, too, the death of her husband was not obligated to disclose her relation to complainant, but she was not put to her election as far as his claims were concerned. She has an absolute right to defend or to let her may come best. She may elect under the law, or she may elect for her will. The decision in that regard is absolutely for her. She might claim under both the laws and the will if the law fit. The defendant are not incapacitated. In a matter of fact, her pleading and her testimony from which theory the could defend by in the fair use fitted her supplemental answer, and complainant did not object to either of these answers. We hold the court did not err in this regard.

III. A second preliminary question is raised by complainant's contention that the court erred in refusing to remove the case, to grant leave to file an amendment to the second amended bill, and to continue the cause for the purpose of making amendments.

The statute of Illinois (Smith-Hurd's Ill. Ann. Stat., 1937, chap. 7, par. 37) grants authority to courts of chancery to permit amendment to bills in intra mean as the court may deem proper, and it is the usual practice to grant such leave at any time during the

pendency of the suit to avoid the effect of a variance in the proofs. Hewitt v. Dement, 87 Ill. 502; Gordon v. Reynolds. 114 Ill. 119.

In support of the motion for leave to amend the affidavit of solicitors for complainant was presented, to the effect that it was in their opinion necessary that the laws of the State of Chihuahua in the Republic of Mexico should be pleaded for the purpose of showing that a certain document executed by complainant and John E. Ward September 23, 1915, was wholly without consideration and void under the laws of Mexico. For reasons we shall later state, we think that an offer to prove such laws would have been wholly immaterial, and for that reason alone it must be held the court did not abuse its discretion in refusing leave to make the amendment. The other ground upon which complainant asked a continuance was that he might produce the testimony of a number of witnesses living in Huron, South Dakota, who made affidavits to the effect that at various times covering a period from September, 1915, to 1920, John E. Ward made certain oral statements to the effect that complainant still had an interest in the premises in controversy. As a matter of fact, the affidavits of these witnesses were not produced in court until July 11, 1932, upon which date the final decree in this case was entered by Judge McCoorty. It is difficult to understand how complainant could be held to have been diligent in this respect in view of the facts disclosed by the record.

The original bill was filed January 22, 1923. The judgment of this court remanding the cause was entered September 14, 1928. Defendant filed an answer to the second amended bill October 3, 1928, and by leave of court she filed a supplemental answer on December 13, 1928, in which she specifically set up that she was defending as a legatee under the will of John E. Ward, thus giving due notice to complainant (it must be presumed) that she would

pendency of the suit to avoid the effect of a variance in the proofs. Davis v. Jones, 87 Ill. 405; Gordon v. Dougherty, 114 Ill. 118.

In regards to the motion for leave to amend the affidavit of noliciture for complainant was erroneous, on the effect that it was in their opinion necessary that the laws of the state of California in the Republic of Mexico should be pleaded for the purpose of showing that a partial transfer executed by complainant and John K. Ward September 20, 1853, was illegal, void under the laws of Mexico. For reasons we shall later state, we think that an effort to prove such laws would have been wholly immaterial, and for that reason alone it was not to hold the court did not abuse its discretion in refusing to leave to make the amendment. The other ground upon which complainant asks a reversal was that on the eight previous the testimony of a number of witnesses living in Boston, South Dakota, who made affidavits to the effect that of various times covering a period from September, 1919, to 1920, John K. Ward made certain oral statements to the effect that complainant still had an interest in the premises in controversy. As a matter of fact, the affidavits of these witnesses were not produced in court until July 11, 1922, upon which date the final decree in this case was entered by Judge Sabourey. It is difficult to understand how complainant could be held to have been diligent in this respect in view of the fact stipulated by the Trustee.

The original bill was filed January 22, 1920. The judgment of this court reversing the decree was entered September 24, 1920. Defendant filed an answer to the cross bill on October 3, 1920, and by leave of court the filed a supplemental answer on December 13, 1920, in which he specifically set up that he was defrauding as a bigotee under the will of John K. Ward, thus giving the notice to complainants (it must be presumed) that he would

contend upon the hearing that he was an incompetent witness. The deposition of Harry J. Ward showing that the deeds from John S. Ward to defendant had never in fact been delivered prior to his death was filed with the clerk of the court February 9, 1929. The proofs before the master were closed April 26, 1929.

The motion of complainant for leave to amend and to take depositions was first presented to the court December 19, 1929, and it was continued from time to time and denied January 6, 1930, and again, as already stated, July 11, 1932. Complainant knew as the hearing progressed that defendant lived outside the State and was attending the trial at great inconvenience and expense. We think he cannot successfully be heard to contend that he was surprised by the ruling of the court that he was an incompetent witness. Nor on these facts can it be maintained that any diligence whatsoever was exercised in order to obtain his testimony. Under such circumstances we cannot hold that the rulings of the trial court constituted an abuse of its discretion. Oliver v. Wilhite, 201 Ill. 582; Rudgear v. U. S. Leather Co., 206 Ill. 74.

Moreover, it is our opinion after an examination of the affidavits, that even if this evidence had been produced it could not have been held conclusive upon the issue, but on the contrary it was so loose and indefinite in character as to have little weight. Similar evidence offered in similar cases has been declared by the Supreme court to be of a "dangerous species" and, as we shall later see in reviewing the evidence in this case, could not under any circumstances be held to be determinative in character. Hutphen v. Cushman, 35 Ill. 186; Lindauer v. Cummings, 57 Ill. 195; Reagan v. Hooley, 182 Ill. App. 250.

IV. The law applicable where a complainant contends that a deed absolute upon its face is in fact a mortgage, is well settled. The early authorities are reviewed in Buckman v. Alwood, 71 Ill. 155,

contend upon the ground that he was an incompetent witness. The deposition of Harry C. Ward showing that the death from John E. Ward to defendant had never in fact been delivered prior to his death was filed with the clerk of the court February 8, 1930. The papers before the master were closed April 28, 1930.

The motion of complainants for leave to amend and to take depositions was filed presented to the court December 12, 1930, and it was entirely true that in that not denied February 2, 1931, but again, in error, July 12, 1932. Complainants have on the hearing proposed that defendant lived outside the state and was attacking the first of great importance and weight. It could be counsel successfully be heard to contend that he was surprised by the ruling of the court that he was an incompetent witness. Nor can there fore can it be maintained that any difficulties which appellants encountered in order to obtain his testimony. Under such circumstances we cannot hold that the rulings of the trial court constituted an abuse of its discretion. Lipsey v. Tribble, 80 Ill. 386; Delaney v. C. & A. Ry. Co., 204 Ill. 74.

Moreover, it is not clearly apparent as a matter of affidavit, that even if this evidence had been produced it could not have been held conclusive upon the issue, for on the contrary it was a long and intricate in character and in some sense weight. Similar evidence offered in similar cases has been declared by the Supreme Court to be also "merely opinion" and, as we shall later see in reviewing the evidence in this case, could not under any circumstances be held to be determinative in character. Hudson v. Cannon, 34 Ill. 240; Dietzer v. Dunham, 37 Ill. 164; Keane v. Hooley, 247 Ill. 420, 430.

IV. The law applicable where a complainant contends that a dead absentee upon the face is in fact a murderer, is well settled. The early authorities are reviewed in Hudson v. Hudson, 74 Ill. 189,

where it was shown that the basis of the rule is found in the abhorrence with which a court of equity regards fraudulent conduct, it being held that an attempt of a grantee to convert that which is mere security for a loan into an absolute conveyance, amounts to fraud, and that parol evidence is therefore admissible to contradict the written deed and to show the actual facts. Of course, the burden of showing the facts which would entitle complainant to relief is upon complainant, and it must be shown by "clear and satisfactory evidence." Aulik v. Fagnata, 303 Ill. 208. All evidence tending to show the intention of the parties that the deed should in fact be a mortgage is admissible. If it is in fact a mortgage, the right of redemption can be cut off only in some way provided by law. Beers v. Ford, 108 Ill. 16. If the instrument was in fact a mortgage at the time it was delivered, it of course remains a mortgage thereafter.

V. The controlling question in this case is whether the decree dismissing the bill was justified under all the evidence. Complainant in his reply brief says (rightly, we think) that the evidence is of such character as to make this question practically one of law. The record establishes the following facts:

Defendant, Lucia A. Ward, at the time of the hearing was 76 years of age. She is the widow of John E. Ward who died at Huron, South Dakota, August 4, 1922, at the age of 84 years. Ten years before his death he suffered a stroke which so affected his right hand that he could write only with difficulty, and his wife, defendant, thereafter wrote most of his correspondence for him.

Complainant Fleming at the time of the trial lived at Glendive, Montana. He was then 47 years old. He also at one time lived in Huron, S. Dak., and the Wards had known him from boyhood. For several years prior to February 3, 1911, complainant had been engaged with John E. Ward in joint adventures which involved the buying and selling of horses, cattle and real estate. Correspondenc

shows that the transactions were spoken of as partnership transactions. The evidence does not disclose what, if anything, each contributed to these joint adventures, but the evidence indicates, as stated by Ward in one of his letters to complainant, that complainant was doing the work while Ward was furnishing the money. In the course of his dealings complainant had secured, apparently on his own account, contracts for the purchase by him of two pieces of real estate in Chicago. One of these was known as 5300 to 5302 Ellis avenue, was on a corner and improved. The other was known as 6457-59 Minerva avenue and was improved by a flat building.

February 3, 1911, complainant, as party of the first part, and the Wards as party of the second part, entered into an agreement in writing, reciting in substance that complainant had a contract for the purchase of these two properties; that the Minerva avenue property was encumbered by a first mortgage of $30,000 and the Ellis avenue property by a mortgage of $45,000; that by the terms of the agreement of purchase a second mortgage was to be put on the Ellis avenue property for the sum of $15,000 and another on the Minerva avenue property for $10,000; that in consideration that the Wards would transfer to complainant five quarter sections of western land described, complainant would agree to deliver a perfect title to this Chicago property to them, upon the further consideration that both parties would sign a note and the Wards would give a mortgage back to secure these notes of $10,000 on the Minerva avenue property and $15,000 on the Ellis avenue property; that the deeds to the property should be delivered to A. W. Wilmarth, attorney for the Wards, at Huron, South Dakota.

Four days later, on February 7, 1911, complainant and the Wards entered into another written agreement, whereby the Wards made a similar agreement to convey four quarter sections of land, which are described, to complainant. This contract, unlike the one dated

February 3, 1911, is signed by Lucia A. Ward as one of the parties of the second part, is under seal and is acknowledged before E. E. Hill, a notary public. Apparently this was intended for the use of complainant in dealing with persons other than the Wards.

On the same day complainant and John E. Ward entered into a another written contract which recites:

"That whereas, the said parties to this agreement have been connected in business relations for the past five years, and at this time in perfecting deals in which they are connected, it is agreed that the Party of the First Part (complainant) shall secure deeds to property in Chicago, described, as follows:"

Thereupon follows a description of the Chicago properties and a statement that they are encumbered by $75,000. The agreement further in substance provides that the parties to the contract "together with Lucia A. Ward, will sign a note and mortgage for twenty-five thousand dollars ($25,000.00) more on the Chicago properties, the deeds and title to the said Chicago properties to be forwarded to A. W. Wilmarth at Huron, South Dakota, the said deeds conveying the title to the said Chicago properties to John E. Ward, Party of the Second part hereto;" that Ward would, at the time of the delivery of title to the Chicago properties to him, deliver to complainant certain land described in Beadle County, South Dakota, and that at the time of the completion of the transfer complainant would give a deed to Ward for 930 acres of land known as the Lindley ranch in Gregory county, South Dakota, subject to a first mortgage of $4500 and a second mortgage of $3350, also a quarter section of land in Stanley county, South Dakota. The agreement further provided:

"The party of the First part (complainant) will not sell and transfer the lands deeded to him by the Party of the Second Part, but that he will hold these as evidence of credit, and at the end of the transactions between the Party of the First Part and the Party of the Second Part, which are to be closed up as soon as they reasonably can, and a division made, the said Party of the First Part will reconvey to the Party of the Second Part the said lands conveyed to him which are herein specified."

The agreement also provided that as soon as Fleming could sell and dispose of the property in which he and Ward were interested, Fleming would deliver to Ward the proceeds to be held by

Pitsburg A. Hill, is joined by Delia A. Ford as one of the parties of the second part, in order that it is mentioned below i. e. Hill, a notary public. Incidentally this was intended for the use of conjointed in dealing with persons other than the Fords.

On the same day mortgagors and from a. Ford gained into a similar written additional total receipt:

"That whereas, the said parties in this instrument have been engaged in business relations for the past two years, and in this time in protecting funds in which they are interested, in an effort that the Party of the first Part (mortgagor) still owedth Delia Ford in property in Odessa, Dentifed, as follows:"

Therefore follows a description of the mortgage properties and a statement that they are mortgaged by $75,000. The aforesaid further is notarized providing that the parties in the mortgage "together with Delia A. Ford, will sign a note and mortgage for twenty-five thousand dollars ($25,000.00) more on the mortgage properties, the deeds and title to the said Odessa properties to be transferred to a. F. Pitsburg as trustee, which Delia, has said deed conveying the title to the said Odessa properties to John S. Ford, Party of the Second Part hereto;" that Ford still, at the time of the delivery of title to the Odessa properties be him, failure to consummate certain land deals called in Tuolle county, Texas Dentfed, and that as the time of the consideration of the transfer mortgagors would give a deed to Ford for the sums of land known as the Lindsay tract in Pitsburg county, Texas Dentfed, subject to a first mortgage of $2500 and a second mortgage of $2500, also a quarter section of land in Kenedy county, Texas Dentfed. The aforesaid further provided:

"The party of the first part (mortgagor) will not sell and transfer the land deeded to him by the party of the second Part, but that he will hold them as evidence of credit, and if the sale of the properties fosses the party of the first Part and the Party of the second Part, which is to be divided by the party of the first Part and the party of the second Part, the said Party of the first Part will pay to the party of the second Part, a reasonable sum, in the event the said land sales will transfer to the party of the second Part the said lands mentioned in the which are herein mentioned."

The agreement also provided that at such as Dentfed would sell and divorce of the property in which he and Ford were interested, Dentfed would deliver to Ford the proceeds to be held by

Ward "until the transactions and sales of property are consummated by the party of the first part as herein agreed to and as soon as all the property is sold the Party of the Second Part will at once deliver to the Party of the First Part one-half of the net proceeds thereof, which he has received from the Party of the First Part, and at that time to convey one of the Chicago properties to the Party of the First Part and the Party of the First Part will reconvey to the Party of the Second Part the lands under this agreement conveyed by the Party of the Second Part to the Party of the First Part." Fleming further agreed to produce a certificate of a reputable Chicago bank that the Chicago properties were of the value of $125,000, and the agreement provided that Ward was to receive the rentals from the Chicago property, pay the taxes, insurance and interest on mortgages therefrom and retain the balance "to be divided between the parties to this agreement on the completing of their affairs as herein agreed to."

This agreement also provided that Ward was to pay out of moneys received from Fleming, first, a note and mortgage in the James Valley Bank for $6700 and any other moneys Ward should have advanced to carry out and aid Fleming in disposing of property and contracts. This agreement further provided:

"It is hereby further agreed that all other written contracts between the said parties to this agreement are hereby cancelled and declared to be of no force and effect";

and further that in addition to this contract, and as a part of its consideration, a separate contract would at that time and date be drawn between the parties to the agreement and Lucia A. Ward, to be used by Fleming in securing the deeds to the Chicago property, "but the said contract is understood by the said parties to this agreement to be subject to all the conditions specified and when the deal is consummated between these parties on the Chicago properties and these tracts of land the said contract will be surrendered up and

that "until the investments and value of property are determined by the party of the first part as herein agreed to and to such as all the property in said the party of the second part will at once deliver to the party of the first part one-half of the net proceeds thereof, which he has received from the party of the first part, and at that time to convey one of the indian ponies in the party of the first part and the party of the first part will transfer to the party of the second part the lands under his possession described in the party of the second part in the part of the first part."

Sending farmer agreed to produce a certificate of a reputable dealer that the indian ponies were of the value of $120.00, and the agreement provided that was to results the ponies from the indian property, any the same, including and the terms on mortgages interest and which the balance "it is clearly between the parties to this agreement as the ownership of this article as herein agreed on."

This agreement also provided that farf was to pay out of earnings received from Jimming, first, a note and mortgage in the Three Valley Loan for $250 and an other mortgage for $1.1 to be paid to amount to enter out and ale Jimming in discovery of property and expenses. This agreement further provided:

"It is hereby further agreed that all other and the contracts between the said parties to this agreement are hereby cancelled and declared to be of no force and effect";

and farfner was to continue to this mortgage, and as a part of its consideration, a separate contract could at that time not have be done between the parties to the agreement and Jimmin J. Jimm, to be used by Jimming in running the claim in the Jimmin area-area, "and he will continue it undertaken by his half parties in this agreement to be subject to all the conditions existing and when the final is consummated between those parties on the Jimmin property and these lands of Jimm the said contract will be surrendered up and

cancelled at the time of said transfers." The agreement further stated that Ward accepted the Chicago properties upon his own judgment and not upon any representations as to value made by Fleming. This agreement was under seal and acknowledged before a notary public.

Thereafter the deed of Isabelle Curran and Richard Curran, dated February 1, 1911, conveying the Ellis avenue property to John H. Ward and Paul E. Fleming was recorded in the recorder's office of Cook county on March 6, 1911.

February 21, 1911, Daniel Duffin and Mary Duffin by warranty deed conveyed the Minerva avenue property to John H. Ward and Paul E. Fleming; which document was also recorded March 6, 1911.

Prior to the recording of these deeds John H. Ward and Paul Fleming executed a trust deed dated February 21, 1911, conveying the Ellis avenue property to Mark F. Madden as trustee to secure an indebtedness of $15,000, and this trust deed was recorded March 6, 1911. On the same date, February 21, 1911, John H. Ward, Lucia A. Ward and Paul E. Fleming made and executed another trust deed conveying to Mark F. Madden as trustee the Minerva avenue property to secure an indebtedness of $10,000. All these conveyances were made subject to the existing mortgages then on these properties. March 1, 1911, Paul E. Fleming by warranty deed undertook to convey a one-half interest in both these pieces of real estate to John H. Ward, and this deed was recorded in the recorder's office of Cook county March 11, 1911.

March 14, 1911, John H. Ward and Lucia A. Ward by a deed undertook to convey to Paul E. Fleming an undivided one-half interest in Lots 1 and 4 in Block 12 in Egandale, being the Ellis avenue property, and "Lot 16 (except the North 35 feet) and Lot 17 in Wadsworth Subdivision of Block 5 in the Second Plat of Woodlawn," being the Minerva avenue property. This deed was

accepted as the line of full transfer." The agreement further stated that Ford accepted the Dodge stockholders upon his own judgment and not upon any representations as to value made by Dimond. This agreement was under seal and acknowledged before a notary public.

Thereafter the laws of Illinois dealing and liquor traffic, dated February 1, 1921, authorizing the sale of stock property to John R. Ford and Fred A. Dimond was received in the secretary's office of Cook County on March 4, 1921.

February 21, 1921, Dodge Bros. and Ford entered into a written agreement covering the Illinois avenue property to John R. Ford and Fred A. Dimond; which agreement was also recorded March 4, 1921.

Prior to the receiving of notice dated June 8, Ford and Fred Dimond executed a joint note dated February 21, 1921, covering the Illinois avenue property to Ford, Dodge to transfer to secure an indebtedness of $10,000, and this joint note was renewed March 8, 1921. On the same date, February 21, 1921, John R. Ford, Dodge & Ford and Fred A. Dimond made an assigned contract which also covering to Ford, Dodge to transfer the Illinois avenue property to secure an indebtedness of $10,000. All these documents were made subject to the existing mortgages upon the Illinois avenue property. March 1, 1921, Fred A. Dimond by warranty deed conveyed to secure a monetary interest in that three-eighths of that which belongs to John R. Ford, and this deed was recorded in the recorder's office of Cook County March 11, 1921.

March 22, 1921, John R. Ford and Dodge & Ford by a deed conveyed in equity to Fred A. Dimond an undivided three-eighths interest in lots 2 and 4 in block 22 in Hyde Park, being the Illinois avenue property, and "Ford is (among the other to Ford) and has 17 in Wabash. Subdivision of block 8 in the second plat of Hyde Park," being the Illinois avenue property. This deed was

recorded June 12, 1911.

July 3, 1911, John H. Ward filed a bill of complaint against Paul E. Fleming in the Circuit court of Beadle county, South Dakota. Ten days thereafter he also filed a bill of complaint against Paul E. Fleming in the Superior court of Cook county, Illinois. Both these bills prayed for an accounting. As a result of this litigation the parties agreed on a settlement of their differences and entered into an agreement in writing dated July 27, 1911. The agreement stated that it was between John H. Ward personally, and by his attorney, A. W. Wilmarth, as party of the first part, and Paul E. Fleming, by his attorney, C. A. Kelley, party of the second part. It recited that the suits above described were pending; that the parties to the action have reached a settlement; that "this agreement is entered into as an adjustment of all differences between the two parties;" that Ward agreed to dismiss both actions and "to accept in satisfaction of his claims and demands against the party of the second part," these two Chicago properties described in the contract. The contract recites that these properties are to be accepted subject to mortgages aggregating $100,000, less $3500 which had been paid; that Ward would accept the lands in Beadle county, South Dakota, subject to the encumbrances against them at the time they were transferred by Fleming, with the additional sum of $5500 with accrued interest thereon from March 14, 1911.

The agreement further provided that said party of the first part also agreed to assume the payment of the notes and obligations which he had given for money paid to the party of the second part of endorsed obligations of the party of the second part; that it should include two notes given by F. C. Lewis for $2000 each and endorsed by Fleming and Fleming thereby agreed on his part "to convey the legal title to the undivided one-half interest to said properties described in Cook county, Illinois,

Saturday June 12, 1915.

July 7, 1915, Rock Island a bill of sporting goods. Joel K. Fleming is the already owner of Beside County, Ninth Ward. Can dogs Ist-after be also list a bill of sporting goods against Joel K. Fleming in the inventory owner of such county, Illinois. Both those bills pertain for no one nothing. As a result of this situation the parties agreed on a settlement of their differences and entered into an agreement to settle said claim for $25,000. The agreement stated that it was between John C. Kirk personally, and for the attorney, C. T. Tillman, on behalf of the first part, and Joel K. Fleming, by his attorney, J. A. Bailey, party of the second part. It stated that the money was paid by the defendant into the hands of the attorney, C. T. Tillman, on behalf of the plaintiff, John C. Kirk, in the attorney's office in Rock Island, Illinois, on June 12, 1915.

The agreement further provided that each party of the first part also agreed to release the pledgees of the notes and obligations which he had given for money paid on the purchase of the second part of different obligations of the party of the second part; that Mr. Kirk should receive the notes given by C. C. Lewis for those goods in Fleming and Fleming; and Joel K. Fleming should receive the notes given by C. C. Lewis for the goods the defendant received in Rock Island, Illinois.

now held by him showing no incumbrances or liens against said one-half interest in said property, subsequent to the time he received said title from the party of the first part;" that he would further agree to convey the legal title to the Beadle county lands subject to the payment of the incumbrances against the same at the time he received the title thereto from Ward and the payment of the additional sum of $5300 with interest thereon from the time Fleming received the $5300 from W. L. Montgomery, the person then holding the equitable title to said premises. The agreement provided that all other papers signed as of that date were to be considered as a part of and carrying out this agreement for settlement; that the abstracts of title to the Beadle county lands to be recertified, showing no other incumbrance against them, and that the abstracts of title to the lands in Beadle county, together with the contract or deed for reconveyance to be delivered to the James Valley Bank for Ward on paying the $5300 and the abstract of title to the Chicago property, should be delivered to Eastman and White for examination; that Ward agreed to dismiss the suit as soon as he received the deeds specified and the abstracts examined to show the title as described, and agreed that each party was to pay his own costs.

On this contract appears the following notation: "I do hereby agree to the foregoing settlement," signed "Lucia A. Ward." The notes which Ward assumed and agreed to pay are by further notation stated to be one to the James Valley Bank for $6700, one to W. L. Montgomery for $10,000, another for $5300, and one to W. C. Lewis for $2[illegible]00, for which John R. Ward had given his individual note.

Thereafter Fleming executed two deeds dated July 27, 1911, conveying to John R. Ward an undivided one-half interest in both properties. These deeds were filed for record in the office of

was held up pending an investigation of Silas Lapham's said one-half interest in said property, mortgaged to the Tide to be received said title from the party of the first part." Then he would furthermore convey the legal title to the Tuckin Mining Lands subject to the payment of the mortgages against the same as the time be received the title thereto from said party of the first part and the payment of the additional sum of $1000 with interest thereon from the 15th Timber received the $1000 from W. L. Montgomery, the person then holding the mortgage on said premises. The aforesaid provided that all other papers signed or at that time were to be considered as a part of and merging and take effect only that the delivery of title to the Tuckin Mining Co. to be recorded had, according to other instruments signed then, and that the delivery of title to the lands in question, [illegible] original or land for reconveyance to be indicated to the Tuckin Taking Such for that as paying the title and the delivery of title to the Tuckin Mining Co., should be delivered to Jackson and Tuckin for consideration; that Tuck agreed to similar the mill as soon as be received the land quitclaimed and the definitely executed to show the title to Jackson, and agreed that such policy not be any the same value.

In this contract appears the following provision: "I to execute given to the Tuckin Mining Company." signed Tuckin & Jack." The extra title that changed and agreed to you are by further contracting clause to be sent to the Jackson Valley Land Co., one to W. L. Montgomery for $1,000, another for $800, and one to T. W. Lewis for $1000, for which from W. Jack had given his individual note.

Tuckin Mining Company was made June 27, 1881, according to Jack, Jack as mortgaged one-half interest in both properties. These deeds were filed for record in the office of

the recorder of deeds of Cook county July 29, 1911. In and by these deeds John E. Ward again assumed and agreed to pay all the mortgages on both pieces of real estate, which then aggregated about $100,000.

As a part of this transaction complainant executed and delivered to John E. Ward three notes for $5,000 each, all dated July 27, 1911, payable to the order of John E. Ward, drawing interest at eight per cent per annum. The notes by their terms were to become due in one, two and three years after date, respectively.

By reason of a mistake in the legal description in the deeds the lands conveyed in the opinion of the Chicago Title & Trust Co. apparently left in complainant Fleming a title of record to the undivided one-half interest in the Minerva avenue property. In 1912 one Madden recovered judgment against Fleming in the courts of Cook county.

The letters which passed between the parties recognize the interest of complainant in the Chicago property prior to July 27, 1911. April 24, 1912, defendant, Mrs. Ward, wrote to complainant saying:

"Mr. Ward says you won't ans: this, but Paul I want to ask you if you couldent let us have some of that $1000. you promised me. I want to go home to see my blind Mother & I dont like to take it away from Mr. Ward as he has so much to pay out, & Paul your 1/2 of interest on your notes are due, dont you think you ought to pay that, we haft to keep up our interest, I want to tell you Paul thoes flats are now in good shape better than when you turned them to us, & it has been through us that they are: I keep a good watch on them, Paul I do think you treated us shameful when you got Mr. Ward down in Sioux City, & made him turn over that $10,000 unbeknown to me, we would have that $25,000 pretty near paid now & we hadent signed any papers to give up that amount, think of it Paul when you go before your cross & in church, isent that terrible Paul, you told Mr. Ward Maddent got $6700. Now we dident owe them anything, we hadent signed up with them, think of it Paul, Cant you get us some money from your rich friend Paul, & then she can take Mexico land for it. I think Mr. Ward is getting too old to be traiding in such realestate what he wants is something that he cantake life easy & Remember Paul when ever you help us pay out on the flats 1/2 of them are yours, we want you to feel an interest in them. Well Paul I hope you will send me a beautiful card in acknowledgment of this letter if nothing moore, I like those

nice cards. they will make quite a nice picture You remember how you & I jawed over the Phone. well it dident amount to nothing.

Yours truly,
Mrs. J. E. Ward."

Apparently, thereafter Ward was informed of the mistake in the deed and fearing impairment of his title by reason of the Madden judgment on March 24, 1915, wrote to Jose M. Lujan, saying that he had been trying for a month to find the address of complainant on account of an error in a deed, adding, "It is to his interest as well as mine to get it corrected." On the following day Mr. Ward wrote complainant to the same effect, requested an answer by night message and reminded complainant that he, Ward, had two or three letters from complainant saying he would make corrections "any time if any thing was wrong."

As a result of negotiation the parties met at Huron, South Dakota, September 23, 1915. Mr. Wilmarth, attorney for John E. Ward, was also present, as was Thomas Fleming, brother of complainant, and his attorney, Mr. Kelley, who had formerly also represented complainant. At that meeting a written "Statement of Indebtedness of Paul F. Fleming to John E. Ward, Since Settlement of July 27th, 1911," was submitted.

The items included the three notes for $5,000 with accrued interest executed July 27, 1911, an item of $1500, apparently advanced by Ward to Fleming "at El Paso," with interest to October 1, 1915, an item of $130 apparently advanced at James Valley Bank October 1, 1915, with interest, an item of $800 cash in Chicago with interest, an item of $200 for rents complainant had collected from the flats in Chicago, with interest, and an item of $230 advanced at Omaha with interest, making a total sum of $22,605.10. For this amount complainant executed and delivered four promissory notes for $5650 each, one of these payable October 1, 1917, another July 1, 1918, and the other two October 1, 1918. All of the notes were to the

order of John E. Ward and drew interest at the rate of six per cent after date. Upon the delivery of these notes the notes executed and delivered July 27, 1911, were marked paid and cancelled and surrendered. John E. Ward acknowledged receipt of these notes by a writing as follows:

"Huron, S. D. Sept. 23, 1915.

Received from Paul E. Fleming four notes for $3650 each, dated September 23, 1915 and due October 1, 1917, July 1, 1918, October 1, 1918 and October 1, 1918, respectfully drawing 6% interest, same being in full settlement for all transaction including the $5300 Montgomery note or money loaned or advanced or given on any stock or lands or any other things that the said Paul E. Fleming has received from me, and I do further in consideration of said notes release any right, title or interest that I may have had or now have in the ranch in Mexico known as the Santa Gertrudis Ranch and Anexes located in Camargo County, State of Chihuahua, Mexico, and I do further state that all transactions between us are hereby settled as per this receipt. The said Paul E. Fleming in further consideration signing a quit claim deed" (here follows the legal description of the Chicago properties) "also the giving of the power of attorney to A. W. Wilmarth and Ralph H. Hawxhurst to quiet title to said property aforesaid described, said Paul E. Fleming at this time certifying that he has never transferred this property to any other person."

This paper also bears the certificate of defendant, Lucia A. Ward, that she has read it, understands it and agrees to its conditions.

As a part of the same transaction complainant executed and delivered a quit claim deed conveying to John E. Ward both of the Chicago properties and executed and delivered the following document:

"This is to certify that in consideration of the receipt at this time drawn to be signed by John E. Ward in full settlement of all claims and demand by him as against me, that I have not at this time and have not had since July 27, 1911 any right, title, interest, claim or demand of any kind, nature or description in the property hereinafter described."

Following this is the legal description of the Chicago properties and thereafter the further statement, "I further certify that I have not transferred, assigned, mortgaged or pledged in any way the said property herein described since the 27th day of July, 1911."

Thomas Fleming, a brother of complainant, who was present, says that after the papers were signed Mr. Ward turned to complainant and said, "Paul, everything is just as it was before; nothing has been changed at all, only we stopped the judgment."

entry of John H. Ford and other interests in the sale of six year
[illegible] bids. Upon the delivery of these notes the orders
transfer was delivered July 27, 1911, were marked paid and can-
celled and surrendered. John H. Ford subsequently presented of
these notes by a writing as follows:

"Dallas, O. T. July 22, 1911.
Dallas Independent Co. Dealing Land Sales for Ellis Co.
Dallas, Texas
Gentlemen: Your Check dated the 19th inst.
Dallas Independent Co. July 1, 1911. Dallas, July 1, 1911.
Gentlemen: I.T.W. was received 1, 1911. Considering dealing
Dallas, Texas being in full satisfaction for all transaction
dealing the 12000 Land Company on the property described as
given on my check or lands or any other things that the call
Fact 6. Finding the property in question, and I do further
statements of said sales relieve my rights, title or interest that
I may have now or ever have in the same, in whole or in part
Dallas Central Land and Trust Company located in Ellis County, State
of Oklahoma, Dallas, and I do hereby state that all transac-
tions between me and hereby relieve me for this receipt. The said
Fact 6. Finding the property mentioned in the deed of the company
deed" from Tillery the legal representative of the deceased person-
ties "in the place of the power of attorney to me, T. Tillery
and Dallas. Therefore to avoid title to said property mentioned
described, said John H. Ford in this same certificate that he
has never transferred this property to any other person."

This proof also bears the certificate of defendant, Lucie H. Ford,
that she has read it, understands it and agrees to its contents.

As a part of the same transaction mentioned above and
attorney a suit claim deed conveying to John H. Ford both of the
Dallas properties and wherein and included the following language:

"This is to certify that in consideration of the receipt of
this time deed to be signed by John H. Ford in full settlement of
all claims and demand by him or claiming on, that I have not at this
time and have not and claim that of, full any right, title, inter-
est, claim or legal of any kind, nature or description in the
property described in deed."

Following this is the legal description of the Dallas properties
and underlier the latter statement, "I further certify that I
have not transferred, assigned, mortgaged or pledged in any way
the land property herein described since the 17th day of July, 1911."

Under date, a brother of complainant, who was present,
says that after the papers were signed by Ford turned to complain-
ant and said, "Tom, everything is just as it was before; nothing
has been changed in all, only we changed the language."

As a part of the same transaction Fleming executed a power of attorney to A. W. Wilmarth or Ralph R. Hawxhurst, authorizing them to appear in any suit in Cook county, Illinois, for the purpose of clearing the title to the property. Pursuant to that power the appearance of complainant was thereafter entered in a suit brought by Ward for the purpose of reforming the forger deed. An answer was filed for complainant by Hawxhurst as his attorney, admitting the allegations of the bill, and a final decree in favor of John E. Ward was entered adjudging "that the fee simple title absolute in and to said property be and hereby is vested and confirmed in complainant herein, John E. Ward."

After the death of John E. Ward on May 28, 1923, Lucia A. Ward began suit against Fleming in the Circuit court of Beadle county, South Dakota, upon the promissory notes given by Fleming to John E. Ward September 23, 1915. Fleming filed an answer in the suit in which he set up that the notes had been fully paid and settled and that he was not indebted to the plaintiff therein; further, that the notes were obtained and secured by fraud and misrepresentation, and that there was no consideration received for them at any time. This answer was verified. Judgment was entered in favor of Lucia A. Ward in that action for $34,272.60.

This is the history of the transactions between those parties so far as they are disclosed by the written documents and court proceedings.

After the settlement of September 23, 1915, there seems to have been practically no business transactions between complainant and John E. Ward. Mrs. Ward (the evidence indicates) received only one letter from complainant thereafter, and there were no claims whatever made by him with reference to this Chicago property until a few weeks after the death of John E. Ward, when complainant called upon the widow. Complainant (who upon this point was a

competent witness) testified in substance that he then demanded his notes, told her that they had been paid out of the rents of the Chicago property, and also demanded that one-half of the property be conveyed to him. He testified also that Mrs. Ward admitted the justice of his claims but stated that he was precluded by a decree and that she therefore would not recognize them. She denied these conversations to which he testified, and there were no other persons present when they took place. There was a later visit by complainant to Mrs. Ward, and on January 22, 1923,- almost twelve years after the first settlement was made and more than seven years after the settlement of 1915, - he filed this suit.

VI. The foregoing, we think is a fair statement of the evidence in this record bearing upon the issues in this case. The evidence naturally falls into four classes: (1) the written contracts and documents manifesting the agreements of the parties; (2) the correspondence between the Wards and complainant prior and subsequent to July 27, 1911; (3) the court records and proceedings showing the litigation between John W. Ward and complainant during Ward's lifetime and between defendant and complainant thereafter; and (4) the conversations and conduct of complainant and the Wards.

In no view which we take of this evidence can it be held to meet the quantum necessary to establish the relationship of mortgagor and mortgagee at any time between these parties. There is not a line or sentence in the documents (many of them executed under the advice of counsel and some of them under seal) from which any such inference may be drawn. The documents as a whole and in every line bear witness against complainant's contention. The correspondence between the parties is the only evidence from which any inference that after July 27, 1911, complainant had any interest in the premises may be drawn. Mrs. Ward in her letter does suggest that complainant help to pay out on the flats in Chicago and tells

him that he should have an interest if he does so; but complainant did not accept the proposal or comply with any of its conditions. Indeed, in one of his letters to the Wards he speaks of the Chicago property as "your property" and in another letter says that he will give an affidavit that he had no interest after the settlement of July 27, 1911. We are not persuaded that complainant was willing to swear falsely against his own interests. It is suggested by counsel that the reason for this admission was that complainant might escape the obligations of an indebtedness due from him to Madden and on which Madden took judgment in 1917. That reason, while plausible, is wholly inadequate.

The court proceedings, too, are quite inconsistent with the theory that complainant had any interest in the premises after July 27, 1911, or certainly after the settlement of 1913. The answer of complainant to the suit Mrs. Ward brought at Huron upon the notes given September 23, 1913, is inconceivable if in fact the allegations of this bill of complaint are now to be taken as true. The court proceedings and the judgments entered may not technically amount to an adjudication of the precise issue raised here, but they do make it quite impossible to believe the facts alleged in complainant's bill.

The whole conduct of complainant, too, precludes a recovery. Defendant contends plausibly that complainant is guilty of laches which would prevent his recovery in a court of equity. That question it is unnecessary to decide. Yet, in weighing the testimony we can not escape the necessary inferences from the fact that from September 23, 1913, and during the life of John E. Ward, this complainant made no claim whatsoever upon the Wards with respect to this Chicago real estate, and that his assertion of his supposed rights was postponed until after the aged man with whom he had been dealing passed away.

Complainant here has argued quite at length the proposition

that there was no consideration for the settlement of September 23, 1915, and has strenuously sought to introduce into the case a controversy with reference to the laws of Mexico which it is claimed have some bearing on that point. As we view the case, those laws were wholly immaterial, and what the same may or may not have been could have little, if any, bearing upon the weight to be given to the testimony appearing in the record. If we assumed that the testimony of witnesses whose affidavits were produced and whose depositions complainant desired to take were all in the record, and if we assumed the truthfulness of the testimony of Thomas Fleming as to remarks by Ward at the time of the settlement of September 23, 1915, the evidence would still be insufficient to establish the relationship of mortgagor and mortgagee between these parties, which is absolutely essential if complainant is to prevail. The written documents, the conduct of the parties, the correspondence between them, the court records, are against complainant on the issue of fact in this case, and as against these indefinite and uncertain evidence as to oral admissions are of little weight.

The question for this court of review is whether we can say the finding of the master, which was approved by the chancellor, on this issue of fact is against the preponderance of the evidence. We cannot say so, and for that reason the decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

that there was no constitution for the territories of Cuyahoga Co. 1811, nor has it commonly been so included but, all have a much interest this information in the line of books which it is desired here now bearing on that point. In so with the site, there have been mostly immaterial, for that the same may or may not have been which have title, if any, leading upon the subject to be given to the territory according to the record. It is assumed that the testimony of witnesses where differing were entered not upon Cuyahoga counties constituent earlier in time were in the record, and if so another the contradiction of the existency of Ohio Circuit as to proceed by force of the law of the territorial of Cuyahoga Co. 1811, the evidence would still be insufficient to establish the existencies of authority of territorial between those points, which is absolutely necessary if conclusion of is proved. The written documents, the records of the district, the proceedings before them, the court records, are almost insufficient in the issue of fact in this case, and so leaves terms inconclusive and unsatisfactory matters in a very indefinite one of little value.

The question for this court of review is whether we can say the finding of the jury, which was approved by the commissioner, on this issue of fact is against the preponderance of the evidence. We cannot say so, and the clear issue the course is affirmed.

AFFIRMED.

Stewart and Bartlett, JJ., concur.

36327

J. W. SULLIVAN,
Appellee,

vs.

THEO. A. SCHMIDT LITHOGRAPHING COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 614

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon contract of employment for the payment of drawing account and commissions and upon trial by the court there was a finding against defendant in favor of plaintiff for the sum of $1733.86, which defendant asks us to reverse.

The cause was tried under an amended statement of claim as amended, defendant having been excused from filing an affidavit of merits. At the close of all the evidence propositions of law and of fact were submitted by defendant, and the rulings of the court thereon have been preserved in the record.

As already stated, the action was for drawing account and commissions alleged to be due to plaintiff under the terms of certain contracts of employment. It is urged that the court erred in allowing claims of plaintiff which in fact had not accrued or matured when the suit was filed, ~~xxxx~~ in permitting recovery of claims for compensation which accrued after the expiration of the contract of employment and plaintiff's resignation accepted, also that the damages were assessed upon an erroneous theory and are excessive, and that the finding of the court is contrary to the weight of the evidence as to certain items on which commissions were allowed.

As the name indicates, defendant corporation is engaged in business as lithographers. On September 2, 1930, plaintiff was employed by defendant as a salesman. The agreement of employment was in writing and of that date and provided that plaintiff should work for defendant exclusively in an agreed territory; that plaintiff

also that

should have a drawing account of $100 a week based on sales credits of $75,000 per year with a five per cent commission on all sales credits in excess of that amount; that after the quota of $75,000 should be reached, plaintiff's commissions were to be due and payable one-half the 10th of the month following the entry of the orders and the balance the 10th of the month following payment of invoices by customers; that sales values rather than billing prices were to be used in making calculations, and adjustments were to be made covering any increases or decreases in orders, and also to cover any cancellations of orders. The contract provided:

> "Sales credits to be calculated as follows:
> Orders sold on our C basis at face value.
> Orders sold on our B basis at 1½ times face value.
> Orders sold on our A basis at 2 times face value.
> Over-price to have a sales credit of 2½ times normal value."

The agreement provided that it would continue until April 30, 1931. On April 24, 1931, there was a further agreement that plaintiff would continue to work on the same basis without any obligation on the part of either party as to the duration of the agreement. On September 14, 1931, a new agreement, effective as of September 1st, was made. It provided that defendant should render to plaintiff a detailed statement the first of each month thereafter, showing the balance of plaintiff's account at the end of the preceding month with additional credits established through new sales during the month and debiting plaintiff's weekly check and special payments which might be made on his account. By this agreement the drawing account was increased to $125 a week, with the understanding that if the volume of business dropped off materially it might be restored to the former sum of $100 a week.

Plaintiff continued to work under this agreement until December 31, 1931, when he voluntarily quit his employment and presented his resignation, which was accepted. This suit for commissions was begun February 11, 1932. In his original proceedings and

up to and after the beginning of the trial plaintiff claimed the total amount due him to be $3179.47 for items stated in detail. Pending this trial this statement of items was by leave withdrawn and plaintiff substituted a statement of account showing a total amount claimed to be due of $1733.86, the amount for which he finally obtained judgment. This amount seems to have been reached by computing the commissions of five per cent on sales amounting in the aggregate as claimed by him to the sum of $35,477.15, plus $60 due on his account. The substituted statement does not purport to show the dates upon which the different items claimed accrued.

Defendant contends and plaintiff admits that the finding and judgment of the court includes items which had not accrued at the date the suit was filed; that a substantial part of the judgment entered was for amounts which matured, if at all, after suit was begun. Defendant argues, on the authority of Hamlin Hale & Co. v. Race, 76 Ill. 472, that plaintiff could not recover damages which had not accrued up to the date of the filing of the suit. Plaintiff on the contrary, cites Sterrett v. Lennards, 211 Ill. App. 286, where the court said in a suit on an alleged lease that there was no error in entering judgment for installments of rent which, although not due when the suit was begun, were due at the time of the trial. What the particular circumstances were in that case do not appear from the opinion, which cites Ency. of Pl. & Pr., vol. 11, p. 841, erroneously printed in the report as volume X.

Hamlin Hale & Co. v. Race, supra, has never been overruled but has been modified with respect to the law there announced regarding suits brought by a discharged employee for separate installments becoming due to him thereafter under the terms of his contract. Trustees, etc. v. Shaffer, 65 Ill. 246; Doherty v. Schipper & Block, 250 Ill. 126; Jones v. Dunton, 7 Ill. App. 530; and see also the note to Ogden Howard Co. v. Brand, 3 A.L.R. 342, and Anno. Cases 1912 D, p. 364.

at is not after the beginning of the fiscal year. Although the total amount due him is to be $[illegible] for items stated in detail, further sale until this requirement of time was by leave of plaintiff and plaintiff manifested a disinclination of measure amounting to total amount claimed to be due of $[illegible], the amount for which he finally obtained judgment. This method seems to have been permitted by accepting the commodities at their cost and on using accounting in the aggregate as claimed by him to the sum of $[illegible], plus 10% for an air amount. The defendants claimed that payment is due when the value upon which the [illegible] claim.

Defendant contends and plaintiff admits that the trial and judgment of the court following first which had not accrued at the date of the filing of the suit. Plaintiff on the contrary, cites Sprague v. Ludington, 191 Ill. App. 514, where the court said in a suit on an alleged loss that there was no error in ordering judgment for installments of rent which, although not due when the suit was begun, were due at the time of the trial. That the particular circumstances were in that case in not issue from the pleadings, which often may, of 72, 2 Ill. App. 14, 3, 361, erroneously winded in the report as volume 2.

Massie v. Ch. R. Co., supra, has never been overruled but has been modified with respect to the time interested in getting suits brought by a discharged employee for accounts including remuneration to the terminated under the terms of his contract. Thorpe, 216 Ill. App. 2, Shafer, 61 Ill. App. 1; Sprague v. Goldmore & Stock, 191 Ill. App. 514. Smith v. Jordan, 7 Ill. App. 1881; and see also the case in Lake Shore R. R. Co. v. Ryan, 3 N.E.R. 242, and Ann. Cases 1912 C, p. 361.

The precise question we have considered here, however, seems to have been determined against defendant in the case of Davis v. Stevens-Davis Co., 192 Ill. App. 374, where the defendant contended, as here, that a disputed item of commission should not be taken into account because it did not accrue until after the beginning of the suit. There, as here, an amended petition making claims for such items was filed. As the opinion in that case is only abstracted, in the report, we quote liberally. The court there said:

"The next question to pass on is the claim of the defendant that the deliveries of the advertising material ordered in certain cases amounting to $1591.75 (on which the commissions would amount to $285.85 according to the defendant's version of the account, and $318.35 according to the plaintiff's) did not take place until after the suit was begun, and that therefore the transactions could not properly be taken into account therein, inas much as Davis, it is claimed, was not to receive credit for his commission until 'the goods were billed out and delivered.' These items were not included in the first Statement of Claim filed, but were brought into the case by the amended Statement of Claim filed October 23, 1913.

"It is not necessary, in our opinion, to pass on the question whether this $285.85 or $318.35, as the case may be, was or was not due under the evidence when the suit was brought. Conceding that it was not, we think the amendment was allowable, the evidence admissible and the judgment correct which took it into account.

"The case of Doherty v. Schipper & Block, 157 Ill. App. 413, was not indeed on all fours with the one at bar, as counsel for appellant point out, but it is of interest as showing that the Appellate court of the Second District thought that, in the light of subsequent opinions, language on which the appellant in this case relies, used in Hamlin v. Race, 78 Ill. 422, needed modification. When the Supreme court affirmed the judgment of the Appellate court it used language in its opinion, evidently with deliberate intent, which to our mind fully covers the right under proper pleadings or amendments (if not indeed without such amendment) to bring into a suit items of the same nature as those originally sued for which matured between the commencement of the suit and the trial. Speaking of an employee who may, under certain circumstances, treat the contract of hiring as continuing, it says:

'And if the suit is not commenced, or if commenced before, not tried, until his term of employment has expired, he may recover the contract price of his wages,' etc.

Doherty v. Schipper & Block, 250 Ill. 126.

"Of this statement the appellant says that it is a pure dictum which cannot overrule Hamlin v. Race. But it affirmed without remark the decision of the Court which had in its opinion criticized that case. We think if the statement was dictum, it was 'a judicial dictum' which we ought to follow, especially as it seems in furtherance of justice and simplicity of action and in no way could have injured nor even embarrassed the defendant in his defence. As appellee says, 'It merely brought before the Court controverted

against defendant

seems to have been determined in the case of *Smith v. Thorne*, *Smith Ex.*, 157 Ill. App. 574, where the defendant contended, as here, that a directed item of commission should not be taken into account because it did not accrue until after the termination of the suit. There, as here, an unsuited petition sought claims for such items was filed. As the opinion in that case in only abstracted, in her report, we quote literally. The court says:

"The main question to pass on is the claim of the defendant that the delivery of the advertising material referred in certain cards according to Exhibit 75 (on which the commissions would amount to $[illegible]) according to the defendant's version of the account, and $[illegible] according to the plaintiff's) did not take place until after the suit was begun, and that therefore the transactions could not properly be taken into account. In as much as Smith, it is claimed, was not to receive credit for his commission until the goods were billed out and delivered, these items were not included in the first statement of claim filed, but were brought into the case by the amended statement of claim filed October 22, 1919.

"It is not necessary, in our opinion, to pass on the question whether such items, or the same may be, can or can not be taken into account, for the only evidence that the plaintiff was entitled to anything, the evidence that it was not, we think are undoubtedly and clearly, the evidence submitted and the judgment certificate which is into account.

"The case of *Thorne v. Thorne*, 157 Ill. App. 574, was not intended on all fours with the case at bar, or command the opinion which we, but it is of interest in showing that the Appellate Court of the Second District, through Mr. Justice Dunn, in the light of such request evidence, insisted on what the evidence in this case represents, was in fact, in the case, Th 574, dist, market conditions.

When the inferior court affirmed the judgment of the appellate court, it said Justice in its opinion, which by with deliberate intent, which is not only fully serve the right under proper pleading or evidence (if not based upon) and undoubtedly to bring into a with issue of the same nature as those originally used for this is matter between the commissioner of the well and the total. Appellate judge of an employee who may, under certain circumstances, treat the contract of giving an commission, it says:

'And if the suit is not successed, as it *[illegible]* *not trial*, until the term of employment has ended, he may recover the amount prior of his wages.' etc.

Thorne v. Thorne, 157 Ill. 574.

In this statement the implicit note that it is a case which cannot overrule *Smith v. Thorne*. But it affirmed without the decision of the court which had in the opinion stating that case. The value of the statement was dictum, it was 'a judicial obiter' which we cept in fairly, especially as it arose in the exercise of justice and equitably of action and in no way could have influenced even indirectly the determination in the cause.

In conclusion, it is merely begging the Court uninterrupted

matter of the same nature as submitted by the original pleadings, the effect of which could only tend to increase the amount claimed. **** In fact it was an advantage to him' (the defendant) 'in that it avoided the necessity of his making defense to a subsequent suit involving the same subject matter.'"

A second question of law arises upon the record. As already stated, the contract of employment was for an indefinite time. Plaintiff's last term of employment began September 14, 1931, was for an indefinite period and was voluntarily terminated by him on December 31, 1931. The drawing account provided for by the written contract had been paid in full. The written statements by defendant as to plaintiff's account at the end of each month had been delivered to him. Printed thereon was a request in substance that any inaccuracy should be called to defendant's attention at once, and no such complaint appears to have been made.

Defendant therefore now contends as a matter of law that, having thus voluntarily quit his employment and ended his contract, plaintiff is not entitled to receive any compensation which had not, accrued and become payable to him during the life of the contract. The statement submitted October 31, 1931, showed a credit on September 2, 1931, in favor of plaintiff under his former arrangement in the sum of $1386.51. This was thereafter augmented by sales and was offset when plaintiff quit his employment by the amount of his drawings which up to December 31st amounted to $2208.34, and unless the second half of his commission which was payable only when invoices should be paid by customers is collectible as the same accrued after the termination of the contract of employment, it is evident that nothing whatever was due to him. This proposition is therefore of controlling importance.

Defendant cites three cases - Colletti v. Knox Hat Co., 252 N. Y. 468, 169 N. E. 648; McCreery v. Day, 6 L.R.A. 503; and Clinton v. Des Moines Music Co., 228 N. W. 664. As the Colletti case is most persuasive by reason of its similarity to the facts here appearing, we shall undertake to analyze it alone. In that case it

matter of the same nature as mentioned by the original plaintiff, the effect of which could only lead to increase the amount claimed. In fact it was an attempt to give 'the defendant' in that it avoided the necessity of his getting defaults by a subsequent suit involving the same subject matter.'"

A second question of law arises upon the record. As already stated, the contract of employment was for an indefinite time. Plaintiff's last term of employment began September 16, 1921, was for an indefinite period and was voluntarily terminated by him on December 23, 1921. The drawing account provided for by the written contract had been paid in full. The written statements by defendant as to plaintiff's account at the end of each month had been delivered to him. Plaintiff therefore was a trespass in substance that any inaccuracy should be called to defendant's attention at once, and no such complaint appears to have been made.

Defendant therefore now contends as a matter of law that, having thus voluntarily quit his employment and ended his contract, plaintiff is not entitled to receive any compensation which had not, earned and became payable to him during the life of the contract. The statement submitted October 23, 1921, showed a credit on September 9, 1921, in favor of plaintiff under his former arrangement in the sum of $1,500.00. This was thereafter augmented by sales and was offset when plaintiff quit his employment by the amount of his drawings which up to December 23rd amounted to $1,800.00, and unless the second half of the commission which was payable only when invoices should be paid by customers is collectible on the same accrued after the termination of the contract of employment, it is evident that nothing whatever was due to him. This proposition is therefore of controlling importance.

Defendant cites three cases - Bailetti v. Tuck [illegible], 222 N. T. 162, 127 N. E. 443; Kelsey v. Jay, [illegible], and Jackson v. Des Moines Steels Co., 224 N. W. 664. As the Bailetti case is most persuasive by reason of its similarity to the facts here appearing, we shall undertake to analyze it alone. In that case it

appeared that the parties entered into an agreement in writing confirming an oral agreement whereby defendant would employ plaintiff in certain territory as a sales agent. Plaintiff was to have a drawing account of $7500 a year, payable monthly, and commissions were to be credited to him on the basis of ten per cent on all sales up to $150,000 for the calendar year. The commission above that amount was to be two per cent, and the total of plaintiff's drawing account, plus money advanced for traveling expenses, would be deducted from the total commissions. The contract was made January 31, 1925. Plaintiff entered upon his employment and continued the same until January 18, 1926, when the agreement was renewed with a modification as to territory, and with the provision that the drawing account should be $10,000 instead of $7500. The complaint alleged that plaintiff continued in the employ of defendant up to September 1, 1926, at which time the employment "was terminated by the consent and agreement of both plaintiff and defendant;" that the sales made by plaintiff between January 1, 1926, and September 1, 1926, totaled more than $150,000; that plaintiff's commissions thereon, at the rate of ten per cent for $150,000 and two per cent for the balance, were $15,010.88; that plaintiff had been paid for his drawing account and traveling expenses $9,038.64; that, after deducting this amount, there was a balance due plaintiff of $5,972.24, with interest, for which he demanded judgment. Plaintiff secured judgment which finally reached the New York Court of Appeals.

The courtin that case stated that while the answer of defendant set forth facts not wholly in accord with the statements made in the complaint, for present purposes it might be regarded as admitting that the allegations of the complaint were true. The opinion stated, however, that the agreement of termination might have provided for a total rescission of the employment contract as from the beginning, in which case it would state a cause of action to recover

asserted that the parties entered into an agreement in writing con-
tracting on real estate which defendant would convey absolute-
ly to certain territory as a joint venture. Plaintiff was to have a
drawing account of $500 a year, provide capital, and commissions
were to be credited to him on the basis of ten per cent on all sales
up to $150,000 for the calendar year. The complaint alleges that
amount was to be two per cent, and the total of plaintiff's draw-
ing account, plus money advanced for travelling expenses, would be
deducted from the total commissions. The contract was made January
21, 1920. Plaintiff entered upon his employment and continued the
same until January 18, 1926, when the agreement was terminated with a
stipulation as to liability, and "it is understood that the draw-
ing account should be $10,000 instead of $7500. The complaint al-
leges that plaintiff continued in the employ of defendant up to
September 1, 1926, at which time the employment was terminated by
the consent and agreement of both plaintiff and defendant;" that
the sales made by plaintiff between January 1, 1920, and September
1, 1926, totaled more than $1,000,000; that plaintiff's commissions
thereon, at the rate of ten per cent for $150,000 and two per cent
for the balance, were $18,[illegible]; that plaintiff had been paid for
his drawing account and travelling expenses $9,[illegible]; that, after
deducting this amount, there was a balance due plaintiff of
$8,972.34, with interest, for which he demanded judgment. Plaintiff
answer judgment which finally reached the New York Court of Appeals.

The courts that have ruled that mere the manner of deduct-
ing not turns ?.ate not usually in accord with the statements made in
the complaint, for present purposes it might be regarded as admit-
ting that the allegations of the complaint were true. The opinion
stated, however, that the agreement of termination might have pro-
vided for a total rescission of the employment contract as from the
beginning, in which case it would state a cause of action to recover

the reasonable value of the services rendered, less the amounts paid; that again, the agreement might have provided that plaintiff should have commissions, at the contract rate, based upon sales made by him prior to September 1, 1926, but it contained no such provisions; that the complainant alleges merely that on September 1, 1926, plaintiff's employment was terminated by the consent and agreement of the parties; that under that statement of the agreement, without more, the presumption was that the parties thereto intended to discharge each other from those contract obligations only which were yet to be performed. The opinion cites Williston on Contracts, sec. 1827, and states:

"In this view the plaintiff was discharged from the obligation of rendering further services, while the defendant was discharged from the obligation of making further payments. As the commissions, provided for by the contract, would not have been payable until January 1st, 1927, the defendant was released from the duty of paying them. The plaintiff, standing upon the terms of the original contract, the termination of which has been alleged, can have no recovery."

The opinion further states that even if plaintiff did not intend by the agreement of discharge to release defendant from its promise to pay commissions, nevertheless he may not procure their payment; that under the terms of the contract of employment of January 18th plaintiff promised to render services to defendant, as its sales agent, throughout the year 1926; that on January 1, 1927, plaintiff was to receive commissions at ten and two per cent, reckoned upon the aggregate prices received through sales made by him during the calendar year, less the amounts advanced for expenses and drawing account; that in such case the doing must take place before the giving; that in all contracts for service, the presumption is that the performance of the service is a condition precedent to the payment for it; that in that case the performance of services throughout the year constituted a condition precedent upon which the payment of commissions was made dependent; that yearly services were

to be exchanged for yearly commissions; that the contract did not provide for an exchange of monthly services for monthly commissions; that plaintiff was not entitled to commissions, either for a year or for a part of a year, since the payment of commissions, as an entirety, was made dependent upon the performance of services, as an entirety, and performance of the latter had not been made. The opinion states that in agreeing to terminate the contract of employment the parties did not otherwise provide; that the court cannot now interpolate a contract provision which the parties themselves neglected to make. Numerous authorities were cited.

While in many respects the facts are similar to those which here appear, we think this case is distinguishable in that in making their contract the parties failed to provide for a yearly service or any other definite period of service as a condition precedent to paying. Plaintiff here had a perfect right to resign and terminate the contract on December 31, 1931. His resignation was not in violation of the terms of the contract but was in accordance with its terms and in conformity with its provisions. It is the contention of plaintiff that the case is controlled by Hackett v. Centaur Motor Co., 189 Ill. App. 372.

In that case Hackett, plaintiff, was employed by defendant corporation for an indefinite term as sales manager at a salary of $35 a week and one per cent 'of the gross sales emanating from the sale of automobiles sold through this office.' The contract was made May 20, 1911. By a supplemental contract made August 19, 1911, it was provided also that Hackett should receive one-half of one per cent on all cars going into the state of Wisconsin after that date, and on that date a Milwaukee company agreed to buy and defendant to sell 250 cars of seven different patterns, the contract providing, however, that the number of each pattern to be taken should be optional. On January 22, 1912, plaintiff was discharged by defendant.

to be responsible for "really monstrous" that the contract did not provide for a reduction of weekly services for especially remote areas; that plaintiff was not entitled to terminate, either for a year or for a part of a year, since the payment of commissions, as an entirety, was made dependent upon the performance of services, as a unitary, and performance of the 1-year had not been made. The opinion states that in expressly or impliedly waiving the contract of employment the parties did not otherwise provide; that the court cannot interpolate a contract provision which the parties themselves deliberately omitted to make. Therefore substantial rights were held.

While in many respects the facts are similar to those which have arisen, we think this case is distinguishable in that in petitioner's case, the parties failed to provide for a yearly service or any other definite period of service in a commission arrangement. Plaintiff never had a property right to receive and retain the contract on December 31, 1941. His reinstatement was not in view of the terms of the contract but was in accordance with its terms and in conformity with its provisions. It is the conclusion of plaintiff that the case is controlled by Jackson v. Chicago Motor Co., 318 Ill. App. 478.

In that case Jackson, plaintiff, was employed by defendant corporation for an indefinite term as sales manager at a salary of $25 a week and one per cent of the gross sales resulting from the sale of automobiles and through his office. The contract was made May 15, 1921. By a supplemental contract made August 18, 1921, it was provided also that commissions should "cease on-half of one per cent on all cars going into the stock of 1922 models after this date, and on that date a different commission agreed to by the defendant is paid for cars of other different patterns. The contract provided, however, that the number of such patterns to be taken should be optional. On January 31, 1922, plaintiff was discharged by defendant.

After that time the Centaur Co. delivered to the Milwaukee company 27 of these cars and was paid therefor $35,908.72, on which amount plaintiff claimed and obtained judgment in the trial court for his commission of one-half of one per cent. It also appeared that on January 22nd the defendant company had written orders for cars amounting to $9,167 from certain retail dealers, which cars were not delivered until after that date. There were also existent at that time alleged contracts of defendant with retail dealers, on each of which small deposits had been paid to defendant company. Each of these alleged contracts contained an agreement on the part of the dealer to buy of defendant a specified number of cars at certain prices for each of the seven patterns of cars therein mentioned, but it was optional with the dealer to take cars of any pattern or patterns. Upon writ of error defendant contended in this court that plaintiff was entitled to receive commissions only on the money received by defendant for cars delivered while plaintiff was in its employ, and it was urged by plaintiff in this court that he was entitled to receive one per cent of the amount received by defendant from the retail dealers with whom defendant had such alleged contracts at the time of his discharge and also one-half of one per cent on the cars delivered to the Milwaukee company after January 22, 1912. The contention of plaintiff was sustained.

In that case, this court in an opinion by Mr. Justice Baker, stated that the alleged contracts were uncertain and lacked mutuality and were at most executory contracts for the sale of cars and not sales under which the title passed; that when the same were executed plaintiff had completed the work he was obligated to do, but that he had not earned his commission when discharged because no binding contracts of sale had been made, nor had the cars which were to be sent to Wisconsin as yet been sent there. The court said, however, that when defendant delivered a car to a retail

of the dealer to buy of defendant a specified number of cars at certain prices for each of the seven patterns of cars thereon mentioned, but it was optional with the dealer to take more of any pattern or patterns. Upon receipt of proper defendant contended in this court that plaintiff was entitled to receive consideration only on the money received by defendant for cars delivered while plaintiff was in its employ, and it was urged by plaintiff in this court that he was entitled to receive one per cent of the amount received by defendant from the retail dealers with whom defendant had such sales contracts at the time of his discharge and also one-half of one per cent on the cars delivered to the Kilsmeyer company after January 22, 1919. The construction of plaintiff was sustained.

In that case, this court in an opinion by Mr. Justice Baker, stated that the sales contracts were unsecured and lacked mutuality and were at most executory contracts for the sale of cars and not sales under which the title passed; that when the cars were delivered plaintiff had completed the work he was employed to do, but that he had not earned his commission when discharged because no binding contracts of sale had been made, nor had the cars which were to be sent to Kilsmeyer as yet been sent there. The court said, however, that when defendant delivered a car to a retail

dealer under such circumstances the moneys received for the car should be regarded as "receipts emanating from a sale of an automobile sold through this office," within the meaning of the phrase as used in the contract of employment and that cars shipped to the Milwaukee company on orders received after plaintiff's discharge must be regarded as "cars going into the State of Wisconsin" within the meaning of the contract. The opinion further states:

> "If the alleged contracts were nothing more than arrangements, when an 'arrangement' with a prospective purchaser ripens into a sale, it gives a right to the agent to a commission for the reason that the agent's efforts are the efficient cause of the sale. Here it is immaterial whether the plaintiff did or did not make the arrangement,' he was entitled to the commissions on the cars sold through defendant's office under arrangements effected while he was in defendant's employ."

The theory upon which the New York case proceeds is that the agreement for compensation is referred to the rescission of the contract. In the case before us, we do not think that the resignation of plaintiff amounted to a rescission of the contract. It ended it. It terminated it, and no new rights would thereafter accrue to either of the parties under it, but its termination did not destroy the right of plaintiff to receive compensation for his services. When defendant accepted the benefit of these services and appropriated to its own use the profits therefrom, equity and fair dealing would require that it should pay the contract price for the same. If we are right, it follows that plaintiff was entitled to recover, in addition to the drawing account he had received, any further commissions which would have accrued to him under his contract between the time of his resignation on December 31, 1931, and the beginning of the suit on February 11 of the following year.

One of the items in dispute concerned a claim on account of an order obtained from Bunte Bros. in September, 1930. Goods were invoiced on this order to the amount of $4308.90, and the court allowed plaintiff a commission thereon, calculated on the "A" basis

[illegible] interpretation the lower court resolved for the de-
fendant is supported as "reasonable from a risk of an unjus-
tifiable-only through-this action," which the meaning of the phrase
as used in the contract of employment and that cases skipped to the
alternative meaning as where previous after plaintiff's discharge
must be included as "were going into the state of financial" which
the meaning of the contract. The opinion further states:

"If the alleged conversion were nothing more than arrange-
ments, then an 'arrangement' with a prospective purchaser please
take a sale, it gives a right to the right to a commission for the
reason that the agent's efforts are the efficient cause of the
sale. Here it is immaterial whether the plaintiff, for or did not
make the arrangement,' he was entitled to the commission on the
sale said through defendant's office where arrangements efforts
while he was in defendant's employ."

The theory upon which the New York case proceeds is that
the agreement for compensation is referred to the termination of the
contract. In the case before us, we do not think that the termina-
tion of plaintiff amounted to a rescission of the contract. It
made it. It terminated it, and so our claim would therefore
accrue to either of the parties under it, but its termination did
not destroy the right of plaintiff to receive compensation for his
services. Then defendant accepted the benefit of these services
and appropriated to its own use the profits therefrom, equity and
fair dealing would require that it should pay the contract price for
the same. If we are right, it follows that plaintiff was entitled
to recover, in addition to the drawing account he had received, any
further commissions which could have accrued to him under his con-
tract between the time of his resignation on December 31, 1931, and
the beginning of the suit on February 11, of the following year.

One of the items in dispute concerned a claim on account of
an order obtained from Bundy Bros. in September, 1930. Goods were
invoiced on this order in the amount of $4302.00, and the court al-
lowed plaintiff a commission thereon, calculated on the "A" basis

(or two times the face value) of $430.39. Defendant offered testimony to the effect that there was a special agreement in regard to this order, in substance, that plaintiff should receive in lieu of commission fifty per cent of any profit defendant might make on the order. It is conceded there were no profits. Plaintiff denied that any such special agreement was made, and claimed that the loss was due to improper work by defendant. Two officials of the defendant company testified to conversations with plaintiff tending to show the special agreement, and one of them, Mr. Thomas, produced the copy of a letter, the original of which he said he had handed to plaintiff, and which set forth such special agreement. Plaintiff was requested to produce the original but said he did not have it and that he did not remember that any such letter was handed to him. It is now argued that this written evidence was manufactured for the occasion. The commission sheet for September, 1930, contains a notation at the bottom with reference to this order, - "Commissions on this order as per agreement." Plaintiff usually received these statements about the 15th of each month. At the close of the evidence defendant tendered propositions of fact to the court in which it specifically asked for a finding to the effect that the order was taken under such special agreement. The finding was refused. The trial court therefore has expressly found against defendant on this issue of fact. That finding is here entitled to the same weight as the verdict of a jury, and while there may be doubt, we do not think the finding should be set aside.

Another controversy between the parties concerned a "Co-Ed order," so-called, taken August 31, 1931. This order was sold by plaintiff at the price of $1730 and goods to the amount of $2287.50 were delivered on it. On this order, however, it appeared that of the total price billed only the sum of $920 was paid by the customer. The contract of September 2, 1930, between the parties provided,

(or two times the face value) of $10,00. Defendant offered testimony to the effect that there was a special agreement in regard to this order, in substance, that plaintiff would receive in lieu of monetary [illegible] for such or any particular defendant might use on the order. It is admitted there were no profits. Plaintiff denied that any such special agreement was made, and claimed that the loss was in keeping with by defendant. The attitude of the defendant tended to contradicts with plaintiff testing in this the special agreement, and one of them, Mr. Thomas, produced the copy of a letter, the original of which he said he had mailed to plaintiff, and which set forth such special agreement. Plaintiff was requested to produce the original but said he did not have it and that he did not remember that any such letter was mailed to him. It is now argued that this written evidence was admissible for the purpose. The [illegible] where the defendant, Mr. [illegible], testifies [illegible] notation on the bottom with reference to this letter, - "Conditions on this order as per agreement." Plaintiff usually received these statements about the 15th of each month. At the close of the evidence defendant tendered propositions of fact to the court in which it specifically asked for a finding to the effect that the order was taken under such special agreement. The finding was refused. The trial court therefore has accurately found against defendant on this issue of fact. That finding is a-e-ntitled to the same weight as the verdict of a jury, and while there may be doubt, we do not think the finding should be set aside.

Another controversy between the parties concerned a "[illegible] order," so-called, taken August 6, 1941. This order was held by plaintiff at the price of $1700 and goods to the amount of $2027.40 were delivered on it. On this order, however, it appeared that of the total price billed only the sum of $[illegible] was paid by the customer. The contract of November 3, 1941, between the parties provided,

after specifying the basis of computing sales values on A, B and C basis, the following: "Over-price to have a sales credit of 2½ times normal value." It was the contention of plaintiff upon the trial that because there was an item of over-price in this order the entire face of the order, or, as he contends, the invoice price, should be multiplied by two and a half and the result entered as the sales credit. In other words, he would read this provision of the contract of September 2, 1930, as if it said that over-price orders should have a sales credit, etc. In this case, the estimate by the salesman and the customer amounted to $1683. The actual sale was for $1750. The amount of the over-price was $67. Multiplying the over-price two and a half times gives $167.50, which added to the estimate gives a total sales credit of $1850.50. Calculating on the "A" basis for sales credit (or multiplying by two) the result is a sales credit of $3701, and so it appeared on the commission sheet of August, 1931, furnished by defendant to plaintiff. There was, however, as plaintiff claimed, a substantial over-run on this order, and plaintiff contended that the entire order based on the invoice should be raised two and a half times to obtain the sales credit. In other words, he claimed a total sales credit of $5,718.75. He admitted that only half of this was due on the entry of the order, the other half to be payable the month after the invoice was paid. He says that figured at five per cent, his commissions amounted to $285.94, one-half of which is $142.97, which upon his theory would become due when the order was accepted and the balance when the payment of $920 was made, and this was the computation approved by the court. As the over-price was all extra profit for defendant, plaintiff's construction of the contract is not unfair, and we think the court did not err in adopting it.

There was also a controversy over a second order obtained in October, 1931, from American Paper Goods Co. This order was for

after specifying the basis of computing sales values on A, B and C basis. The following: "over-prices to have a sales credit of the three normal values." It was the contention of plaintiff upon the trial that because there was an item of over-price in this order the entire face of the order, or, as he contends, the invoice price, should be multiplied by two and a half and the result entered as the sales credit. In other words, he would read this provision of the contract of September 2, 1930, as if it said that over-price items should have a sales credit, etc. In this case, the calculus by the salesman and the customer amounted to $1000. The actual sale was for $1000. The amount of the over-price was $27. Multiplying the over-price two and a half times gives $67.50, which added to the estimate gives a total sales credit of $1067.50. Calculating on the "A" basis for sales credit (or multiplying by two) the result is a sales credit of $2003, and so it appeared on the commission sheet of August, 1933, furnished by defendant to plaintiff. There was, however, no plaintiff claimed, a substantial error in this order, and plaintiff contended that the entire order based on the invoice should be reduced two and a half times to obtain the sales credit. In other words, he claimed a total sales credit of $2,716.75. He admitted that only half of this was due on the entire of the order, the other half to be payable the month after the invoice was paid. He says that figured at five per cent, his commission amounted to $1[illegible]. Subtract or which is $1[illegible], which was his theory would become due when the order was accepted and the balance when the payment of $500 was made, and this was the computation approved by the court. As the over-price was all extra profit for defendant, plaintiff's construction of the contract is not unfair, and we think the court did not err in adopting it.

There was also a controversy over a second order obtained in October, 1933, from American Paper Goods Co. This order was for

185,000 lithographed paper envelopes, printed in three colors and gold, at $10.20 a thousand. The evidence shows there was a similar order the previous year for 170,000 of these envelopes in four colors and gold at $12.90 a thousand, and upon that order plaintiff was credited on an "A" basis. The controversy as to this order is as to whether this last order should be computed, like the first, on an "A" basis, or, as defendant contends, on a "C" basis.

Defendant claims that the second order was taken at a very low price, was refigured to meet competition, and as finally submitted the estimate included commission only on a "C" basis. As the order was for envelopes in three colors and gold, the court held that it was properly computed as "A" Basis--'Color Work.'" We think the court did not err in computing the amount due to plaintiff on the second order upon the same basis upon which defendant computed it on the first.

There is also a controversy as to an order taken from Libby, McNeil and Libby, but what we have already said disposes of defendant's objections to the allowance as made by the court on this item also. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

$36,000 intermediate order mortgages, payable in three years and $42,000 in 10,000 a thousand. The evidence upon that was a similar order for previous year for $[illegible] of these mortgages in four months and $42,000 a thousand, and upon such order plaintiff was credited on an "A" basis. The contractor on to this order is as to whether this last order should be computed, like the first, on an "B" basis, or, as defendant contends, on a "C" basis.

Defendant claims that the method upon which it is very low price, was reduced to such contradiction, and as finally submitted the estimate indicated contradiction only on a "C" basis. As the order was for mortgages in three months and $42, the court held that it was properly computed on "A" basis--"Order Work." To allow the court did not err in overruling the motion for to plaintiff on the second order upon the same basis upon which defendant computed it on the first.

There is also a contractor or to an order taken from Lily, Ewell and Lily, but what to have already said disposes of defendant's objections to the allowance as made by the court on this item also. The judgment of the trial court is therefore affirmed.

LEWIS.

Gilmer and Gilmer, for appellant.

36596

WALTER FREEMAN and UNIVERSAL CREDIT COMPANY, a Corporation, Appellees,

vs.

THE HOME INSURANCE COMPANY, NEW YORK, a Corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 614

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant Insurance company appeals from a judgment against it and in favor of plaintiffs, Walter Freeman and the Universal Credit Co., in the sum of $450, entered upon the finding of the court. The action was based upon a contract for insurance on an automobile purchased by plaintiff Freeman about the time the policy was issued, March 16, 1931.

The car was a Ford, model Victoria, ordered March 15, 1931, from the Sheridan-Costello, Inc., dealers in Chicago, at the price of $652.50. Freeman received a credit of $315 for a used car, leaving a balance of $337.50 due on the purchase price. The Universal Credit Co. financed the transaction and advanced to Freeman that amount plus $16.09, premium on the insurance policy issued at the same time by defendant company.

For the amount it advanced the Credit Co. took the written obligation of Freeman, secured by a chattel mortgage on the automobile, and the loan was made payable in installments, one of which was due each month thereafter. The insurance policy was for $652.50.

The Motor City Agency acted as agent for defendant insurance company. The offices of this agency and the Credit company were in the same room, and both used the same telephone service.

The insurance policy was received by Freeman through the mails, he says almost fifteen days after it was issued. He re-

WILSON MURRAY and DITMARSH
INSURT COMPANY, a corporation,
Appellees,

vs.

THE NEW ENGLAND COMPANY,
INC TEXAS, a corporation,
Appellant.

Mr. Justice Jackson delivered
the opinion of the court.

Defendant insurance company appeals from a judgment against it and in favor of plaintiff, Sidney Freeman, on the mortgaged Chevrolet Co., in the sum of $600, entered upon the finding of the court. The action was based upon a policy for insurance on an automobile purchased by plaintiff Freeman about the time the policy was issued, March 24, 1930.

The car was a ford, model Victoria, ordered March 15, 1931, from the Sheridan-Oberhelle, Inc., dealers in Chicago, at the price of $600.00. Freeman received a credit of $225 for a used car, leaving a balance of $375.00 due on the purchase price. The University Credit Co. financed the transaction and advanced to Freeman that amount plus $18.00, premium on the insurance policy issued at the same time by defendant company.

For the amount it advanced the Credit Co. took the written obligation of Freeman, secured by a chattel mortgage on the automobile, and the loan was made subject to insurance, one of which was due one month thereafter. The insurance policy was for $600.00.

The Motor Agency acted as agent for defendant insurance company. The offices of this agency and the Credit company were in the same room, and both used the same telephone service.

The insurance policy was received by Freeman through the mails, he says almost fifteen days after it was issued. He re-

ceived it at his residence, 3977 South Park avenue in Chicago, where he had lived for the past five years with his family. It was proved at the trial without contradiction that the automobile in question was stolen August 27, 1931.

There is much conflict in the evidence as to whether notice was given in compliance with the terms of the policy. However, it appears without contradiction that after claim was made by Freeman against defendant company defendant wrote a letter, which is in evidence, denying liability upon the sole ground that the policy was cancelled prior to the loss. The effect of this letter was to waive all other defenses. Peoria Marine & Fire Ins. Co. v. Botto, 47 Ill. 516; Annes v. Carolan, Graham, Hoffman, Inc., 336 Ill. 542.

Defendant contends, however, that plaintiffs are precluded from making proof of waiver because of their failure to plead it and cites to this point Trichelle v. Sherman & Ellis, 259 Ill. App. 346; Feder v. Midland Casualty Co., 316 Ill. 552. A complete answer to this contention is that by an additional record filed by plaintiffs in this court it appears that plaintiffs replied to the affidavit of merits and specially set up that all other defenses had been waived.

The controlling question in the case therefore appears to be whether the policy was in fact cancelled prior to the time plaintiffs' automobile was stolen. The burden of proving that defense was, of course, upon defendant. The provision in the policy with reference to defendant's right to cancel was as follows:

"This policy may be cancelled at any time by this Company by giving to the Assured five (5) days written notice of cancellation with or without tender of the excess of paid premium above the pro-rata premium for the expired term, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium, if not tendered, will be refunded on demand. Notice of cancellation mailed to the address of the Assured stated in this Policy shall be a sufficient notice."

It is of course elementary that every ambiguity in regard to

after it at his residence, 5977 South Park Avenue in Chicago, where he had lived for the past five years with his family. It was proved at the trial without contradiction that the notification of termination was signed August 27, 1931.

There is much conflict in the evidence as to whether notice was given in compliance with the terms of the policy. However, it appears without contradiction that after claim was made by Frances against defendant company defendant wrote a letter, which is in evidence, denying liability upon the sole ground that the policy was cancelled prior to the loss. The effect of this letter was to waive all other defenses. Travis Lumber & Slip Co. v. Union, 27 Ill. App. 3d; Amos v. Continental Casualty Co., 348 Ill. App. 444.

Defendant contends, however, that plaintiffs are precluded from making proof of mailing because of their failure to plead it and allege in this point Triebold v. Burman & Ellis, 328 Ill. App. 218; Tudor v. Midland Casualty Co., 332 Ill. 388. A complete answer to this contention is that by an additional record filed by plaintiffs in this court it appears that plaintiffs replied to the affidavit of merits and specifically set up that all other defenses had been waived.

The controlling question in the case therefore appears to be whether the policy was in fact cancelled prior to the time plaintiffs' beneficiaries was insured. The burden of proving that fraud was, or should, upon defendant. The provision in the policy with reference to defendant's right to cancel was as follows:

"This policy may be cancelled at any time by this company by giving to the insured five (5) days written notice of cancellation with its address and a tender of pro rata premium share the premium for the expired term, which accompanies, if not tendered, shall be refunded on request. Notice of cancellation shall state that such excess premium, if not tendered, will be refunded on demand. Notice of cancellation mailed to the address of the insured stated in this policy shall be a sufficient notice."

It is of course elementary that every ambiguity in regard to

this provision of the policy must be construed in favor of plaintiffs and against defendant. Defendant assumed the burden of proof that such notice was given. Produced as a witness, a former employee in the office of the Motor City Agency, which issued policies for defendant company, said that on March 21, 1931, she mailed to plaintiff Freeman at his address, 2977 South Park avenue, a letter partly in writing and partly in printing. The attorney for defendant asked counsel for plaintiffs to produce the original of this letter, but attorney for plaintiffs replied that no such letter had ever been received.

The witness then produced a supposed copy of this notice and said that while she was in the office of the Motor City Agency on March 21, 1931, she mailed the original signed notice to Freeman. She said that before she mailed the original she folded, stamped, and checked it with the carbon copies, and then dropped it in the mail chute in the Engineering building in Chicago where the offices of the Motor City Agency and the Credit company were located. She said that she took Freeman's address from a copy of the policy issued to him; that the address was always checked and that the paper produced was an exact carbon copy of the original that was put in the envelope. The document was offered in evidence by defendant, and is as follows:

"The Home Insurance Company, New York
Branch Office Copy

March 21, 1931.

Walter Freeman,
2977 South Park Ave.,
Chicago, Ill.

Dear Sir:

We elect to cancel our policy No. CMG 81283 issued to you on March 16, 1931, and hereby give you five (5) days notice hereof, as provided by the terms of said policy.

Take notice that on the 26th day of March, 1931 at twelve o'clock noon, or if that date is not five (5) days from the receipt hereof, then, at the expiration of the five (5) days from its receipt, the said policy will terminate and cease to be in force.

The excess of paid premium above the pro rata premium

this provision of the policy must be construed in favor of plaintiffs and against defendant. Defendant asserts the terms of great that such notice was given. Produced as a witness, a former employee in the office of the Motor City Agency, which issued policies for defendant company, said that on March 28, 1931, she mailed to plaintiff Freeman at his address, 8717 South Park avenue, a letter partly in writing and partly in printing. The attorney for defendant admitted for plaintiffs to produce the original of this letter, but attorney for plaintiffs replied that he had never been received.

The witness then produced a carbon copy of this letter and said that while she was in the office of the Motor City Agency on March 28, 1931, she typed the original of the letter to Freeman. She said that before she mailed the original she folded, stamped, and placed it with the carbon copies, and then dropped it in the mail chute in the Engineering Building in Chicago where the offices of the Motor City Agency and the Credit Company were located. She said that she took Freeman's address from a copy of the policy issued to him; that the address was always checked and that the paper produced was an exact carbon copy of the original that was put in the envelope. The document was offered in evidence by defendant, and is as follows:

"The Home Insurance Company, New York
Fremont Office Dept
March 27, 1931.

Mr. Fremont,
8717 South Park Ave.,
Chicago, Ill.

Dear Sir:

In view of the medical and policy fee, the policy issued to you on March 21, 1931, not having gone into force [2] days medical exam, as provided by the terms of said policy.

Take notice that on the 30th day of March, 1931 at twelve o'clock noon, or if that date is not five (5) days from the receipt hereof, then, at the expiration of the five (5) days from the receipt, the said policy will terminate and cease to be in force.

The excess of said premium above the pro rata premium

for the expired time (if not tendered) will be refunded on demand.

Respectfully yours,
THE HOME INSURANCE COMPANY,
NEW YORK
C. M. Martindale
Secretary

Return premium refunded to
Universal Credit Company.

X.....X"

The witness further testified that the Motor City Agency were brokers for defendant insurance company; that she did not recall the number of notices she sent out on that day but that on certain days she mailed out more than on other days; that she remembered the name Walter Freeman as there was some discussion in the office due to the frequency of losses. She said that the original cancellation notice was put in an envelope by itself, and that there was no return address on the envelope; that she did not mail a copy of the notice to the Universal Credit Co.; that she got the information she placed on the notice from the office copy of the policy, and that she prepared the policy for mailing but did not mail it. She also said that the manager, or someone in the office with authority, gave her instructions to send out the notice of cancellation.

Defendant also produced I. A. Hall, special collection manager for the Universal Credit Co., who said he knew Walter Freeman, and that the Credit Co. received notice of the cancellation of the Freeman policy on or about March 21st, not later than the 22nd, of 1931; that the Universal Credit Co. received the tissue copy of the original notice, which copy was defendant's exhibit No. 2; that "we have a pick-up system in our office and we have a clerk who takes mail from one office to another." He also said that the Credit Co. was doing a considerable amount of business with the Home Insurance Co., and had a debit and credit system of bookkeeping between the two companies; that the Credit Co. received a so-called credit memorandum that applied to the Freeman account.

This credit memorandum was received in evidence and states

The witness further testified that the Motor City Agency were brokers for Informal Insurance company; that she did not remembered the number of months she went out on that day but that on certain days she called out more than on other days; that she remembered the name Walter Freeman as there was some discussion in the office due to the frequency of losses. She said that the original cancellation notice was put in an envelope by itself, and that there was no return address on the envelope; that she did not mail a copy of the notice to the Universal Credit Co.; that she got the information she placed on the notice from the office copy of the policy, and that; she prepared the policy for mailing but did not mail it. She also said that the manager, or someone in the office with authority, gave her instructions to send out the notice of cancellation.

Defendant also produced I. L. Hall, special collection manager for the Universal Credit Co., who said he knew Walter Freeman, and that the Credit Co. received notice of the cancellation of the Freeman policy on or about March 21st, not later than the 23rd, of 1931; that the Universal Credit Co. received the thirdd copy of the original notice, which was returned's exhibit No. 3; that "We have a pick-up system in our office and we have a clerk who takes mail from one office to another." He also said that the Credit Co. was doing a considerable amount of business w/ the Home Insurance Co., and had a debit and credit system of bookkeeping between the two companies; that the Credit Co. received a re-called credit memorandum for crediting to the Freeman account.

This credit memorandum was received in evidence and states

for the assigned time (if not included) will be returned as unpaid.
Respectfully yours,
UNIVERSAL CREDIT CORPORATION,
NEW YORK
E. W. Christopher
Secretary

Return credits returned to
Universal Credit Company.

E.....Ex

under date of March 21, 1931, that the Credit Co. has credited to the account of Walter Freeman the amount of $16.09 as return premium by reason of the cancellation of his policy. It bears the initials of W. W. B., which are the initials of W. W. Bloom.

The witness also stated that the Universal Credit Co. advanced the premium for the insurance, which Freeman paid back in installments, and that it was prorated among twelve installments; that, however, Freeman had not paid all the installments. He said that he first saw the notice of cancellation in 1931, he believed in October; that he presumed it was put in the files in March; that he knew Oelrich wrote the letter of October 27, 1931, to Freeman, and that he handled the Freeman account from the date of the loss; that Freeman had paid up his account from the date of the loss, and that August 22nd he had made a payment of $39 upon his indebtedness.

At least three different copies of alleged notices appear in the record, all purporting to cancel this policy and all dated March 21, 1931. One of these appears in the original affidavit of merits and states that the policy will terminate and cease to be in force at noon on March 23rd. Another appears in the second affidavit of merits and states in substance that the insurance will expire March 26, 1931, at twelve o'clock noon, "or if that date is not five (5) days from the receipt hereof, then, at the expiration of the five (5) days from its receipt." A third states that the policy will expire at twelve o'clock noon March 26th and, unlike the others, states that the premium has been refunded to the Universal Credit Co. "for the account of all interests." This copy was contained in a notice served by counsel for defendant upon the attorney for plaintiffs. The copy of the alleged notice introduced in evidence states in substance that the policy will terminate on noon of March 26th, or if the date is not five days from the receipt, then at the expiration of five days from its receipt; and as to the premium paid,

major date of March 31, 1922, they the Strait Co. has credited to the account of Walter Freeman the amount of $6.00 as return premium by reason of the cancellation of his policy. It bears the initials of W. H. B., which are the initials of W. H. Bloom.

The witness also stated that the informal credit Co. advanced the premium for the insurance, which Freeman paid back in installments, and that it was reported among twelve installments; that, however, Freeman had not paid all the installments. He said that at first saw the notice of cancellation in 1921, he believed in October; that he presumed it was put in the files in March; that he knew Friday the letter of October 27, 1920, to Freeman, and that he handled the Freeman account from the date of the issue; that Freeman had paid up his account from the date of the issue, and that August 20th he had made a payment of $20 upon the indebtedness.

At least three different copies of alleged notices appear in the record, all purporting to cancel said policy and all dated March 31, 1921. One of these appears in the original affidavit of merits and states that the policy will terminate and cease to be in force at noon on March 31st. Another appears in the second affidavit of merits and states in substance that the insurance will expire March 31, 1921, at twelve o'clock noon, "or if that date is not five (5) days from the receipt hereof, then at the expiration of five (5) days from the receipt." A third states that the policy will expire at twelve o'clock noon March 31st, unless the premium shall be paid to Lewis Bloom, interested in the Interwest Credit Co. "for the account of all interests." This copy was contained in a notice served by process for interest upon the attorney for plaintiff. The copy of the affidavit notice introduced in evidence states in substance that the policy will terminate at noon of March 31st, or if the date is not five days from the receipt, then at the expiration of five days from its receipt; and as to the premium paid,

states that the "excess (if not tendered) will be refunded on demand."

Plaintiff Freeman testified that he did not know whether he had any dealings with the Motor City Agency; that he did not know the difference between that company and the Home Insurance Co. He positively denied that he had ever received the notice of cancellation. He further testified that he went to the office of the Universal Credit Co. about September 28th (which was after the loss) and talked with the man in the office, who told him to continue paying his notes and that the insurance would be adjusted. He also said that about thirty days prior to that time and shortly after the loss Mr. Koegel, a police officer, notified defendant company by 'phone; that he stood by while Koegel talked over the 'phone; that on the Monday thereafter Koegel dictated a letter stating when the car was stolen, and that he (witness) signed this letter and gave it to Koegel to mail.

Koegel testified that the Monday morning after the theft, after looking up defendant's name in the telephone directory, he called the number listed and advised the company that Freeman's car was stolen. He also testified to mailing a letter signed by Freeman directed to defendant company. Freeman produced a letter from the Universal Credit Co. directed to him, dated October 27th, in which the Credit Co. said it had contacted the Home Insurance Co. in connection with the insurance on his automobile and was informed by it that the cancellation notice was mailed March 26th, and had not been returned; that the insurance had therefore been cancelled, and that the company was looking to Freeman for payment of the balance of the indebtedness due, which amounted to $273. The letter urged payment of this amount and threatened drastic action if Freeman did not compl;

Another letter from the Universal Credit Co. addressed to Freeman, dated December 31, 1931, suggests that he call at the office of the Credit Co. in connection with his account, "also the

stated that the "cheque (if not tendered) will be returned on demand."

Plaintiff Freeman testified that he did not know whether he had any dealings with the sister city agency; that he did not sign the application between that company and the Home Insurance Co. He positively denied that he had ever received the notice of cancellation. He further testified that he went to the office of the Universal Credit Co. about September 28th (which was after the loss) and talked with the man in the office, who told him he continue paying his notes and that the insurance would be adjusted. He also said that about thirty days prior to that time and shortly after the loss to, Keogel, a police officer, [illegible] [illegible] by "phone; that he stood by while Keogel talked over the 'phone; that as the Sandy Universalist Keogel showed a letter stating that the car was stolen, and that he (witness) signed this letter and gave it to Keogel to mail.

Keogel testified that the Monday morning after the theft, after looking up defendant's name in the telephone directory, he called the number listed and without the company that Freeman's car was stolen. He also testified to mailing a letter signed by Freeman directed to defendant company. Freeman produced a letter from the Universal Credit Co. dated to him, dated October 27th, in which the Credit Co. said it had cancelled the Home Insurance Co. in connection with the insurance on his automobile and was informed by it that the cancellation notice was mailed earlier 28th, and had not been returned; that the insurance had therefore been cancelled, and that the company was looking to Freeman for payment of the balance of the indebtedness to, which amounted to $[illegible]. The letter urged payment of this amount and threatened legal action unless if Freeman did not comply.

Another letter from the Universal Credit Co. addressed to Freeman, dated December 21, 1921, suggests that he call at the office of the Credit Co. in connection with his account, "also the

possibility of effecting settlement with the Insurance company." November 23, 1931, the Motor City Agency wrote Euclid Taylor, attorney for Freeman, stating that the insurance policy had been cancelled under date of March 28th and the company could therefore not give the matter further consideration.

If we are to regard the evidence as being in conflict, it is hardly necessary to cite authorities to the proposition that where, as here, the trial was had before the court without a jury, the presumption is that the court has considered only competent evidence (American Inv. Co. v. U. S. Fidelity & Guaranty Co., 267 Ill.App.370), and that the finding of the trial judge who saw and heard the witnesses is entitled to the same weight as the verdict of a jury. (Stephens-Adamson Mfg. Co. v. Fireman's Fund Ins. Co., 257 Ill. App. 443; Israel v. Selman, 263 Ill. App. 351).

Upon the issue of fact we cannot say that the finding of the court is contrary to the manifest weight of the evidence. There are circumstances in the evidence tending very much to discredit the evidence produced by defendant. The material variance in the alleged notices of cancellation is one of these. Conduct of the Credit Co. inconsistent with the fact of notice of cancellation to it is another. The letters of that concern to defendant are inconsistent with the idea that such notice was in fact given.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, J., concurs.

McSurely, J., dissents.

possibility of attaching antipathy with the interview evidence."

November 22, 1971, the court city judge Donald Hodge, denied for Freeman, stating that the interview policy had been established under date of June 1969 and the company could therefore not give the matter further consideration.

If we are to regard the evidence as being in conflict, it is hardly necessary to cite authorities to the proposition that where, as here, the trial was had before the court without a jury, the presumption is that the court has considered only competent evidence (Morrison Inv. Co. v. S. Pacific R. Co., 207 Ill.App.374), and that the finding of the trial judge who saw and heard the witnesses is entitled to the same weight as the verdict of a jury. (Hamburg-American etc. Co. v. Firemen's Fund Ins. Co., 227 Ill. App. 414; Ingal v. Calman, 283 Ill. App. 321).

Upon the issue of fact we cannot say that the finding of the court is contrary to the manifest weight of the evidence. There are discrepancies in the evidence tending very much to discredit the witness produced by defendant. The uncertain testimony in the alleged policies of cancellation in use at times, conduct of the trucks to. Inconsistent with the fact of notice of cancellation to it is another. The letters of that concern to defendant are inconsistent with the idea that such notice was in fact given.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor, J., concurs.

McGloon, J., dissents.

36702

CHICAGO TITLE AND TRUST COMPANY,
as Trustee,
Appellee,

vs.

JANE GERAGHTY et al.,
Defendants.

On Appeal of SOLOMON BROWN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

272 I.A. 614

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On June 27, 1930, the Chicago Title & Trust Company, as trustee, filed a bill in the Circuit court of Cook county to foreclose a trust deed given to secure the payment of bonds to the amount of $575,000.

Brown, the owner of three of these bonds of the par value of $1,000 each, presented a petition of intervention, praying that he might become a party to the suit. Leave to file it was denied, and from that order he prosecutes this appeal.

The question for decision is whether the court erred in entering the order which denied the motion for leave to file the petition.

The facts as they appear from the record are that the cause was referred to the master August 18, 1931, the proofs closed and an order for objections to be filed by November 1, 1932, entered by the master. The motion for leave to file an intervening petition was presented January 27, 1933.

Complainant argues that the petitioner was guilty of laches and that the petition was vulnerable to demurrer upon other grounds, and that the motion was therefore rightly denied.

The petition avers that it is filed for petitioner, Solomon Brown, and for all other bondholders similarly situated. It sets up petitioner's ownership of three bonds, and states that the same

were brought from a Chicago concern which sold the issue to the public generally; that this company went out of business afterward and prior to April 16, 1930; that a bondholders protective committee was then organized and that on that date a deposit agreement was prepared, a copy of which is attached to the petition; that on March 1, 1930, a default was made on the indebtedness secured by the trust deed, and that on June 26, 1930, upon the application, as claimed, of twenty per cent of the holders of the bonds, the trustee declared the whole indebtedness due; that the trustee became the depositary for bonds under this agreement and prior thereto and thereafter secured deposits of divers of the bonds; that the trustee thereafter filed its bill to foreclose; that on June 30, 1930, complainant filed a motion for receiver; that the matter was continued twenty times, when an order was entered that the same should be taken up thereafter on one day's notice; that nothing further has been done since with reference to the appointment of a receiver; that on August 18, 1931, an order defaulting certain defendants and referring the cause to the master was entered, and that the master has prepared a report and given notice to the parties to file objections, if any, on or before November 1, 1932, but that no action with reference to this report has since been taken;

That the report recommends the allowance of a solicitor's fee in the sum of $19,300 and finds the total cost to be $22,139.45, and that these costs were a first lien upon the premises and the report finds other sums due to the amount of $683,715.05, which were a second lien; that prior to March, 1931, the protective committee requested the Chicago Title & Trust Co., the depositary, to deliver the bonds deposited to the First National Bank of Chicago; that said committee then made a demand loan from said bank in the sum of $56,000; that said bank retained the bonds as security for said loan, now reduced to $44,000, with interest;

were brought from Chicago concerns which sold the issue to the public generally; that this company was not of reputable character and prior to April 16, 1920; that a bankruptcy petition against the company was originated and that or that date a receiver was appointed; that the company, a city of Wash. 2d existed in the position; that on June 1, 1920, a default was made on the interest-bearing coupons by the bond; that on June 28, 1920, upon the application, as claimed, of twenty per cent of the holders of the bonds, the trustee instituted the suit; indebtedness due; that the trustee brought the foreclosing the bonds under its agreement and prior thereto and thereafter received deposits of bids of the bonds; that the trustee interpleaded filing the bill to foreclose; that on June 29, 1920, proceedings filed a petition for receiver; that the matter was continued through time, when an order was entered that the case should be taken up thereafter on one day's notice; that nothing further has been done with reference to the appointment of a receiver; that on August 18, 1921, an order authorizing certain defendants and referring the cause to the master was entered, and that the master has prepared a report and given notice to the parties in the cause, if any, on or before November 1, 1921, but that no notice has ever been given to the report has since been taken;

That the report recommends the allowance of a solicitor's fee in the sum of $18,300 and finds the total fees in the $80,000.00; and that there remain over a first lien upon the property and the trustee finds other fees due in the amount of $[illegible], which are a second lien; that prior to June, 1921, the protective committee appointed the Chicago Title & Trust Co., the depositary, to deliver the bonds deposited to the first National Bank of Chicago; that said committee then made a loan from said bank in the sum of $[illegible]; that said bank retained the bonds as security for said loan, and claimed to have [illegible] the bonds;

That by virtue of an agreement and arrangement made with the owners of the equity said owners collected and continued to collect the rents, profits and income from the premises described in the bill of complaint through the Real Estate Management Corporation, which acts as management agents for the owners of the equity of redemption; that said owners have continued to collect the rentals subsequent to the filing of the bill of complaint; that on or about March 1, 1931, the bondholders protective committee paid to the owners of the equity of redemption the sum of $15,000 for a quit claim deed and the premises were thereupon conveyed to one Zimmerman, an employee of the Chicago Title & Trust Co., who was acting as trustee, complainant and depositary; that Zimmerman now owns the premises on behalf of the bondholders protective committee; that in addition to the payment of $15,000 alleged to have been made from the $56,000 borrowed by the bondholders protective committee, said committee purchased all of the furniture and equipment of the building described in the bill of complaint for $22,750, and that said payment was made from the loan of $56,000 borrowed from the bank, and that these payments for the equity and for the furniture were made notwithstanding the fact that the furniture was worth less than $10,000 and notwithstanding the fact that the payment of $15,000 for the equity of redemption was made for no useful purpose of any kind;

That the above payments were made without any authority whatsoever under the deposit agreement of April 16, 1930, but that in order to attempt to validate and give authority to the bondholders protective committee to make the payments, the protective committee attempted illegally to amend the deposit agreement; that an additional sum of approximately $19,000 was expended and paid by the committee to itself "for various unauthorized and illegal expenses and secret profits," and that the Real Estate Management

Corporation, which is now collecting the rents for Zimmerman, has turned over an income of $13,327.95 to the Chicago Title and Trust Co., as trustee, and that the Trust Company has unlawfully and without authority of any kind, nature or description delivered and paid over this money to the bondholders protective committee and that committee has paid it over to the First National Bank to apply the same upon the loan of $56,000 borrowed from the bank, so that there now remains in the Zimmerman Agency account less than $500, as the net proceeds from the income, issues and profits in the operation of the building since June 27, 1930;

That the general taxes for the year 1930 in the sum of $14,016.32 remain unpaid and that a penalty of one per cent per month is now accruing; that "the said bondholders protective committee and the said Chicago Title & Trust Co. as trustee, has unlawfully and without authority, used the rents, issues and profits from the said premises for illegal and unlawful purposes."

It is further alleged that petitioners have been informed by the bondholders protective committee that the committee with the aid and connivance of the Chicago Title & Trust Co. intend to proceed "with the foreclosure herein to a decree of sale for the purpose only of bidding in for the said premises a sum not to exceed $.05 on the $1.00 for the purpose of acquiring the interests of the non-depositing bondholders, of which your petitioner, Solomon Brown, is one."

It is also alleged that petitioners are informed that the protective committee intends to make a charge for a plan of reorganization, which has not, as yet, been submitted to any of the bondholders, including petitioner, of one and a half per cent of the total bond issue outstanding for committee expense, one and a half per cent of the total bond issue outstanding for depositary expense, one per cent of the total issue outstanding for individual

Corporations, under it, may anticipate the taxes for themselves, but earned over an income of $2,500.00 to the change 1910 and front 5%., on income, and that the total company has maintainly and without minority of any kind, nature or characteristics, and paid over this money to the beneficiaries respective conditions and that everything has paid it over in the first instance that is simply the same thing the sum of 100,000 borrowed from the bank, as that there was reason in the Commission change occurred over than 1910, as the act provides from the income, larger and profits in the exercise of the building, since June 17, 1910;

That the General Taxes for the year 1910 is the sum of $24,000.00 amount and that a penalty of one per cent per month is now accordingly since "the only beneficiaries principle corporations the said 1910 Title 2 that is, in Ontario, the majority and without minority, and the taxes, income and profits from the said provisions for liquor and minerals mineral."

It is further alleged that petitioners have been informed by the Beneficiary principle corporations that the municipalities will and not continuance of the Ontario 1910 Act and, inform to provincial fund the revenues arrived in a income of sale for the purpose of giving in for the said premium a sum not to exceed $.02 per $1.00 for the purpose of supplying the interests in the municipalities, at their own privileges, income from, is so.".

It is also alleged that petitioners are informed that the preparative committee intends to make a change for a plan of operations, which may not, so yet, been published to any of the beneficiary, including petitioner, of one and a half per cent of the total land issue outstanding for municipal purposes, as and a half per cent of the total land issue outstanding for separately income, one per cent of the total issue outstanding for individual

committee members' expense, three quarters of one per cent of the total issue outstanding for trustee's expenses, in addition to the five per cent of the gross income, which has been and will continue to be charged in connection with the management of the premises.

The petition also avers that the bondholders protective committee fraudulently and without the purview of the terms and provisions of the deposit agreement and in direct violation of petitioner's rights in the premises and with the design and intent to conceal from petitioner, as well as from the depositing bondholders, the actions of the committee made or caused to be made certain payments and disbursements, and in order to cover up and attempt to validate the unlawful and illegal action so taken, the Chicago Title and Trust Co., as depositary, the bondholders protective committee and the said Trust Co. as trustee, attempted to write into, without the consent or knowledge of the said depositing bondholders, amendments authorizing these unlawful expenditures.

The petition avers that the chairman of the bondholders protective committee is the president of the Chicago Title & Trust Co.; that the Chicago Title & Trust Co., through its officers and agents, dominates and controls the depositary and the bondholders protective committee, and that the Chicago Title & Trust Co. is acting in an unlawful manner in administering trust property in a triple capacity, in that the payment of the rents and profits collected by the trustee was applied upon a loan effected by the bondholders protective committee and the depositary, manifestly disclosing a combination as to design and action amounting to conspiracy and fraud and in direct violation of the rights of petitioner, and that unless the court grants the prayer of the petition, appoints a receiver and supervises the expenditures made and to be made under such receivership, as well as by its order restrains the

committee members' expense, three quarters of one per cent of the total issue outstanding for trustee's expenses, in addition to the five per cent of the gross income, which fees shall and will continue to be charged in connection with the management of the premises.

The petition also avers that the committee protective committee fraudulently and without the purview of the terms and provisions of the deposit agreement and in direct violation of petitioner's rights in the premises and with the malign and intent to exclude from participation, as well as from the foreclosing bondholders, the actions of the committee made or caused to be made certain payments and disbursements, and in order to cover up and attempt to validate the unlawful and illegal action so taken, the Chicago Title and Trust Co., as depositary, the bondholders protective committee and the said Trust Co. as trustee, attempted to write into, without the consent or knowledge of the said defaulting bondholders, amendments authorizing these unlawful expenditures.

The petition avers that the attorneys of the bondholders protective committee is the president of the Chicago Title & Trust Co.; that the Chicago Title & Trust Co., through its officers and agents, dominates and controls the depositary and the bondholders protective committee, and that the Chicago Title & Trust Co. is acting in unlawful concert to individually benefit personally in a triple capacity, in that the payment of the fees and profits realized by the trustee are spilled upon a less effrontery by the bondholders protective committee and the depositary,multiplying disciplinary complication or to create for malign something to conspiracy and fraud in direct violation of the rights of petitioner, and that unless the court grants the order of the petitioner, complete a receiver and supervise the expenditures made and to be made which have precedents, he will be by its lower receivers the

parties made defendant thereto from any further unwarranted assumption of jurisdiction over the property mentioned in the bill and directs the cancellation of the deposit plan so far as it affects petitioner and others similarly situated, petitioner will suffer great and irreparable injury and a direct monetary loss and damage, for the recovery of which he has no adequate remedy at law.

The petition prays that the Chicago Title & Trust Co., its officers and agents, as depositary and as trustee, answer the petition within a short date to be fixed by the court; that the bondholders protective committee (the members of which are named) be required to answer the petition and disclose all of their acts and doings in connection with the premises; that pending the coming of the answers the court may by its order restrain any proceeding and acts on the part of any person or persons, other than the receiver to be appointed by the court, including the enjoining of the First National Bank of Chicago, from disposing or attempting to dispose of any bonds or property in the way of collateral heretofore deposited by the bondholders committee and that petitioner may have general relief. The prayer of the petition further is that leave may be given to file it; that a receiver may be forthwith appointed as prayed for in the bill of complaint and the petition; that the Chicago Title & Trust Co., as depositary and as trustee, and the bondholders protective committee be required to account to petitioner in their respective capacities; that upon the ascertainment of said account that trustee may be removed and some suitable person appointed trustee, and that all orders necessary and requisite to protect the jurisdiction of the court in the operation of the property mentioned and described in the bill of complaint be made and entered, including "such restraining orders as may be necessary or requisite to preserve the property for the benefit of all the bondholders similarly situated as is your petitioner in the premises.'

parties made defendant answer from any interest unauthorized assumption of jurisdiction over the property mentioned in the bill and direct the execution of the decree plan so far as it affects petitioner and others similarly situated, petitioner will suffer great and irreparable injury and a direct monetary loss and damage, for the recovery of which he has no adequate remedy at law.

The petition prays that the Illinois Title & Trust Co., its officers and agents, be enjoined and restrained, pending the petition within a short date to be fixed by the court; that the defendant bankers protective committee (the members of which are named) be required to answer the petition and disclose all of their acts and doings in connection with the premises; that pending the coming of the answer the court may by its order restrain any proceeding and acts on the part of any person or persons, other than the receiver to be appointed by the court, including the obtaining of the first National Bank of Chicago, from filing or attempting to file any bonds or property in the way of collateral hereinfore designated by the bondholders committee and that petitioner may have general relief. The prayer of the petition further is that leave may be given to file it; that a receiver may be forthwith appointed as asked for in the bill of complaint and the petition; that the Illinois Title & Trust Co., as depositary and as trustee, and the bondholders protective committee be required to account to petitioner in their respective capacities; that upon the ascertainment of said amount that itself may be received and some suitable person appointed trustee, and that all orders necessary and requisite to protect the jurisdiction of the court in the operation of the property mentioned and described in the bill of complaint be made and entered, including "such restraining orders as may be necessary or requisite to preserve the property for the benefit of all the bondholders similarly situated as is your petitioner in the premises."

The petition also prays that a summons may be issued against the parties named to appear and answer this petition.

The prayer for appeal did not mention any particular court and it is contended in behalf of the Chicago Title & Trust Co. and others that the appeal should be dismissed or stricken from the docket for that reason. Reliance is placed on Mississippi Valley Ins. Co. v. Bermond, 39 Ill. App. 267, a case which was decided in the third district, while in the later case of Ill. Central R.R. Co. v. Commissioners, 61 Ill. App. 203, the decision is to the contrary. Following this last named case a motion heretofore made to dismiss was denied, and we adhere to that ruling.

The granting of the prayer of a petition of this kind filed after the bill has been pending for a long period of time is a matter resting in the sound discretion of the chancellor, and his decision will not be reviewed unless there has been an abuse of that discretion. Gunderson v. Ill. Trust & Savings Bank, 100 Ill. App. 461. After a somewhat careful consideration of the petition, we conclude that the chancellor in this case did not abuse his discretion.

Petitioner is the owner of $3,000 par value of bonds out of a total debt of $683,715. His interest therefore is about 3/684ths of the total held by all the bondholders. The petitioner has not deposited his bonds with the committee and is, of course, under no obligation to do so; but we may not overlook the fact that his interest is small compared with the interests of all the bondholders. Although this court will be vigilant to protect his rights, it will also be equally vigilant to see that he is not permitted "to create a maneuvering value" in his bonds. American, etc. Co. v. 180 East Delaware Bldg.Corp., 262 Ill. App. 67. As a matter of fact, his complaints as to the loan procured by the bondholders committee from the bank, as to the purchase of the equity of redemption and as to the various payments made out of the proceeds of this loan, the

The petition also prays that a mandamus may be issued against the petitioner commanding him to appear and answer this petition.

The prayer for general relief not mentioning any particular court and it is contended in behalf of the Chicago Title & Trust Co. that where such the court should be dismissed or stricken from the docket for that reason. Reliance is placed on Blackstone Valley Ins. Co. v. Stevens, 32 Ill. App. 127, a case which was decided in the state district, which in the civil case of Ill. Central R.R. Co. v. Commissioners, 21 Ill. App. 321, the decision is to the contrary. Relatively this last named case a United Interpleaders suit to discharge was denied, and we adhere to that ruling.

The pleading of the prayer of a petition of this kind that after the bill has been pending for a long period of time in a matter pending in the usual discretion of the chancellor, and his decision will not be reviewed unless there has been an abuse of that discretion. Gandrowsky v. Ill. Trust & Savings Bank, 190 Ill. App. 631. After a somewhat careful consideration of the petition, we conclude that the chancellor in this case did not abuse his discretion.

Petitioner in the amount of $1,100 per year or based upon a total sum of $20,712. The original indebtedness is about $[illegible] of the total held by all the bondholders. The petitioner has not deposited his bonds with the committee and is, of course, under no obligation to do so; but we may not overlook the fact that his interest is well secured with the interest of all the bondholders. Although this court will be vigilant to protect his rights, it will also be equally vigilant to see that he is not permitted "to create a unnecessary value" in his bonds. Mattingly, etc. vs. Y. M. C. A. Building Ass'n, 260 Ill. App. 97. As a matter of fact, his complaints as to the loss procured by the bondholders committee from the bank, as to the purchase of the equity of redemption and as to the various payments made out of the proceeds of this loan, the

violation of the terms of the deposit, the allegation as to the intended charges of the committee for a plan of reorganization, etc. are all matters of which as a non-depositing bondholder he has no right to complain. The petitioner's interest in the $15,000 item of rents which he says the trustee had improperly turned over to the bondholders committee is less than $60, and there is no allegation that complainant will be unable to make a proper account of this item so far as petitioner's rights are concerned. The allegation that it is the intention of the parties at the foreclosure sale to bid in the premises at five cents on the dollar and thus acquire the interest of the non-depositing bondholders, is a mere conclusion of the pleader. Under the statutes (which we must presume the court will follow) such a sale can be made only after public notice, and any non-depositing bondholder will have a right either to bid at the sale or to object to any sale which is made at a sacrifice or contrary to the interests of all the bondholders which it is the duty of the trustee to protect. The powers of a court of equity are ample in such case to protect every party in interest. Its arm is not shortened in such case. We may not doubt that petitioner will receive ample protection from the chancellor if such attempt is made. This court adheres to the doctrine of Firebaugh, Trustee, v. Seagren, 266 Ill.App. 381; American Trust & Safe Deposit Co. v. 180 East Delaware Bldg. Corp., 262 Ill. App. 67; and Samuels v. Meyerowitz, 270 Ill. App. 216; but this petition (which seems to be somewhat in the nature of an original bill is altogether multifarious) and would introduce a practice and procedure which would be intolerable. The court did not err in denying leave to file it, and the order is affirmed. Kohs v. Kraemer Bldg. Corp., 266 Ill. App. 597.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

36729

CHARLES W. FRIEDMAN,
Plaintiff in Error,

vs.

THE AETNA CASUALTY & SURETY COMPANY,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

89

272 I.A. 614

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit upon an alleged oral contract to insure plaintiff against loss by robbery or burglary, in which defendant filed a plea of the general issue, there was a trial by the court with a finding in favor of defendant on defendant's motion and judgment in defendant's favor, which plaintiff seeks to reverse by this writ of error.

The assignments of error raise the controlling question of whether such oral contract to insure plaintiff was in fact made.

There is evidence in the record tending to show that on September 4, 1930, Friedman, plaintiff, conducted a store for men's clothing and furnishings at 7411 West Madison street, Forest Park, Illinois, under the name "Men's Style Shop." At the same time one Ernest Reich conducted a brokerage business at No. 7421 on the same street, dealing in real estate and insurance. In connection with his business Reich employed a solicitor named Schlomann. In the early morning of September 4, 1930, the store of Friedman was held up and robbed. Friedman testified that about ten o'clock on the same morning and after this robbery occurred, Schlomann came to his (plaintiff's) place of business and said to him, "From now on you ought to have holdup insurance." Plaintiff says that his landlord (a Mr. Reich) and a Mr. Quandt were present at this conversation; that he and Schlomann went over the rates for such insurance together; that he told Schlomann that he would take $2000 insurance at $16.50 per thousand, and Schlomann replied, "All right. In just

[illegible]

[illegible] v. [illegible].

Plaintiff in Error,

vs.

THE AREA CONCRETE & TUNNEL COMPANY,
Defendant in Error.

MR. PRESIDENT FUSTICE BRICKLEY
DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit upon an alleged oral contract to insure plaintiff against loss by reason of burglary, in which defendant filed a plea of the general issue, there was a trial by the court with a finding in favor of defendant on defendant's motion and judgment in defendant's favor, which plaintiff seeks to reverse by this writ of error.

The assignments of error raise the controlling question of whether such oral contract to insure plaintiff was in fact made.

There is evidence in the record tending to show that on September 4, 1908, Friedman, plaintiff, conducted a store for men's clothing and furnishings at 7211 Halsted street, Roseland, Cook, Illinois, under the name "Ben's Style Shop." At the same time one Brandt Bolon conducted a burglary business at No. 7221 on the same street, doing in real estate and insurance. In connection with his business he employed a solicitor named Goldsmith. In the early morning of September 4, 1908, the store of Friedman was held up and robbed. Friedman testified that about ten o'clock on the same morning and after his robbery occurred, Goldsmith came to his (plaintiff's) place of business and said to him, "You may as you ought to have fulton insurance." Plaintiff says that his insurance (i.e. Bolon) was a $5, Goldsmith was present at this conversation; that he and Goldsmith went over the rules for such insurance together; that he told Goldsmith that he would take $1000 insurance at $12.50 per thousand, and Goldsmith replied, "All right. In just

a few minutes I will call the insurance company and come back and let you know right away." Plaintiff says Schlomann then left the place and returned after five or ten minutes and stated, "Everything is all right. They will accept you and you are covered." Plaintiff further testified: "I asked him when I could expect the policy and he told me not to worry, that it would come in in a day or so. In regard to paying for the policy, he said I had a charge account in the office with the Reich Agency. I had no account with The Aetna Casualty & Surety Company."

On the following morning, September 5th, a man who stated he was from the defendant company came to the store and talked with plaintiff about the insurance. Plaintiff says that the man did not inspect the premises; he just talked.

About two o'clock in the afternoon of the same day plaintiff's store was again robbed. Two men walked in and asked plaintiff to show them some hats; one of them flashed a gun and told him to walk to the back; the other man asked for the keys to the store; plaintiff gave the keys to him and the man locked the front door. Plaintiff says they searched him and taped his mouth, eyes and his hands back of him, and that he could hear the back door open and a car drive up to the back door and in fifteen or twenty minutes all the rest of the merchandise was carried out; that when he finally got loose he called the police department and told them what had happened.

Plaintiff says that after the police left he went over to Mr. Reich's office and told a Miss Schlomann who worked there what had happened; he says Miss Schlomann took her file and opened it, and said, "I have got your application right here. You don't have to worry; you are covered." He says he asked her for a claim blank and she told him to see Mr. Schlomann or Mr. Reich; that later in the day he saw Mr. Schlomann but didn't get a claim blank from him,

a few minutes I will call the insurance company and come back and let you know right away." Plaintiff says Gudermann then left the place and returned after five or ten minutes and stated, "everything is all right. They will accept you and you are covered." Plaintiff further testified: "I asked him when I could start the policy and he told me not to worry, that it would come in in a day or so. He wanted to paying for the policy, he said I had a savings account in the office with the field agency. I had no account with the Lutes Community & Savings Company."

On the following morning, September 8th, a man who stated he was from the defendant company came to the store and talked with plaintiff about the insurance. Plaintiff says that he was not impressed the proposition; he just talked.

About two o'clock in the afternoon of the same day plaintiff's store was again robbed. Two men walked in and asked plaintiff to show them some meat; one of them flashed a gun and told him to walk to the back; the other man came for the safe in the store; plaintiff gave the safe to him and the man locked the front door. Plaintiff says they searched him and taped his mouth, eyes and his hands back of him, and that he could hear the back door open and a car drive up to the back door and in fifteen or twenty minutes all the rest of the merchandise was carried out; that when he finally got loose he called the police department and told them what had happened.

Plaintiff says that after the police had he went over to Mr. Hatch's office and said a nice Gudermann was worked there that had happened; he says this Gudermann took his file and opened it, and said, "I have got your application right here. Don't have to worry; you are covered." He says he asked her for a claim blank and she told him to see Mr. Gudermann or Mr. Hatch; that later in the day he saw Mr. Gudermann but didn't get a claim blank from him,

and that Schlomann said that he had no claim blank coming and no policy.

Henry C. Reich, called as a witness by plaintiff, testified that he was present at plaintiff's place of business September 4th when Mr. Schlomann came into the store; that Clarence Quandt was also present; that Schlomann held a conversation with plaintiff in the presence of witness, when Schlomann said, "I just called up the office and I have got you covered." The witness said he did not know how many times Schlomann was in there but that Schlomann explained the rates; that plaintiff asked the witness what he knew about The Aetna Casualty & Surety Company and witness replied that it was a very good company.

Quandt testified that he was present at the time in question, September 4th; that plaintiff and Schlomann were talking about burglary insurance, and that Schlomann said plaintiff was covered.

Schlomann testified that he was employed as a real estate and insurance solicitor by Ernest Reich; that September 4th he called defendant Insurance company about nine o'clock; that he called the Interior Holdup department and asked a Mr. Rieck, connected with the Burglary department of defendant company, to verify the rate on the risk witness was about to write, and asked him when he would be able to come out to make an inspection on a holdup risk; that Mr. Rieck said he would be out next morning, the 5th. Schlomann said he did not make any office record or card prior to the receipt of a letter from defendant company which is in evidence, but called up and placed the order over the telephone. Ernest Reich testified that he received the following letter from defendant company September 6, 1930:

and that Dahlemann said that he had an claim plant coming and so policy.

Henry G. Hales, called as a witness by plaintiff, testified that he was present at plaintiff's place of business September 4th when Dahlemann came into the store; that Ellsworth Smith was also present; that Dahlemann held a conversation with plaintiff in the presence of witness; when Dahlemann said, "I just called on the office and I have got you covered." The witness said he did not know how many times Dahlemann was in store but that Dahlemann explained the rates; that plaintiff asked the witness not to know about the issue usually a surety company and witness replied that it was a very good company.

Joseph Smith testified that he was present at the time in question, September 4th; that plaintiff and Dahlemann were talking about burglary insurance, and that Dahlemann said plaintiff was insured.

Dahlemann testified that he was employed as a real estate and insurance solicitor by Ernest Keim; that September 4th he called defendant Insurance company about nine o'clock; that he called the Interior Building department and asked a Mr. Hines, connected with the Surety department of defendant company, to verify the rate on the yeek mistake; and asked him what he would be able to come out to make an inspection on a Dahlem risk; that Mr. Hines said he would be out next morning, the 5th. Dahlemann said he did not make any office record or send paper to the receipt of a Lieber Drum defendant company which is in evidence, but called up and placed the order over the telephone. Ernest Keim testified that he received the following letter from defendant company September 5, 1910:

"Chicago, Illinois, Sept. 5, 1930

Mr. Ernest Reich,
7421 Madison Street,
Forest Park, Illinois.

Dear Sir:
Re: Interior Holdup Insurance
Charles W. Friedman.

We are in receipt of your order for the above casualty assured, and have given same careful consideration. After doing so we find it necessary for the company to decline this risk inasmuch as the assured has sustained a loss and also due to the class of merchandise carried by the insured. Assuring you that we are sorry it is necessary for us to take this action, we are

Yours very truly,
C. M. Rieck,
Burglary Department.

D. B.
D. B. H."

Plaintiff contends that an oral or preliminary contract of insurance is legal and binding, citing Firemen's Insurance Co. v. Kuessner, 164 Ill. 275; Cottingham v. National Church Ins. Co., 290 Ill. 26, and other cases. We do not understand that there is any doubt about this proposition. The cases cited so hold, and it is generally held that in the absence of a statute inconsistent therewith, such oral contracts are valid and enforcible when made by persons duly authorized. The essentials of such contract are well stated in an opinion by Mr. Presiding Justice McAllister in People's Insurance Co. v. Paddon, 8 Ill. App. 447:

"There is no statute in this State affecting the validity of such a contract; and the doctrine is now very generally recognized in this country that the rules of the common law present no impediment, providing that all the requisites prescribed by those rules as indispensable to every contract, be complied with. As respects a verbal contract of insurance, those requisites are substantially these: The minds of the respective parties must, at some instant of time, have met upon all the essentials of the contract. Those essentials are: the parties thereto; the subject-matter of insurance; the amount for which it is to be insured; the limits of the risk, including its duration in point of time, and extent in point of hazards assumed; the rate of premium; and generally upon all the circumstances which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other. May on Ins., sec. 43; Hamilton v. Lycoming Mut. Ins. Co., 5 Penn. St. 337; Audibon v. The Excelsior Ins. Co., 27 N. Y. 216."

A consideration of all the evidence in this record discloses a failure to establish the facts necessary to the existence of such

"Chicago, Illinois, July. 2, 1938

Mr. Ernest Salch,
7221 Antioch street,
Forest Park, Illinois.

Dear Sir:

Re: Intrastate motion insurance
Charles V. Tyleman.

We are in receipt of your letter for the above mentioned insured, and have given some careful consideration, after doing so we find it necessary for the company to decline this risk inasmuch as the assured has sustained a loss and also due to the class of merchandise carried by the insured. Assuring you that we are sorry it is necessary for us to take this action, we are

Yours very truly,
F. M. Black,
Underwriting Department.

R. M.
R. M. S."

Plaintiff contends that an oral or preliminary contract of insurance is legal and binding, citing Firemen's Insurance Co. v. Lawrence, 144 Ill. 470; Hutchinson v. National Union Ins. Co., 290 Ill. 60, and other cases. We do not understand that there is any doubt about this proposition. The cases cited so hold, and it is generally held that in the absence of a statute insurance contracts, also oral contracts are valid and enforcible when made by persons duly authorized. The essentials of such contract are well stated in an opinion by Mr. Presiding Justice Moldenhauer in Fowler's Insurance Co. v. Fielden, 4 Ill. App. 417:

"There is no statute in this State affecting the validity of such a contract; and the decisions in new are very generally recognized in this country that the rules of the common law present no impediment, providing that all the requisites prescribed by those rules as indispensable to every contract, be complied with. As regards a verbal contract of insurance, these requisites are substantially these: The minds of the respective parties must, at some instant of time, have met upon all the essentials of the contract. Those essentials are: The subject matter; the multiplicator of insurance; the amount for which it is to be insured; the risks or the risk, including the duration in point of time, and extent in point of hazard; the rate of premium; and generally, upon all the attendance which are peculiar to the contract and distinguish it from every other, so that nothing remains to be done but to fill up the policy and deliver it on the one hand, and pay the premium on the other. Bay on Ins., sec. 43; Hamilton v. Lycoming Ins. Co., 5 Pass. 62, 67; Audubon v. The Excelsior Ins. Co., 27 N. Y. 216."

A consideration of all the evidence in this record discloses a failure to establish the facts necessary to the existence of such

contract. In the first place, there is no proof that Schlomann was in any sense the authorized agent of defendant company. On the contrary, the proof is uncontradicted that he was the agent only of the broker Reich. True, the broker might under circumstances such as existed in Boston Store v. Hartford Indemnity Co., 227 Ill. App. 192, have become the agent of the Surety company, but there were no such circumstances here nor circumstances such as existed in the other cases plaintiff cites, tending to show agency. The whole evidence tends to prove that the application of plaintiff was simply submitted to the Insurance company for its consideration, to be accepted or rejected after investigation. The evidence also shows that such application was made and the application rejected.

Plaintiff argues (quite unreasonably as it seems to us) that the letter of rejection tends to show that defendant orally accepted plaintiff's application. He argues the existence of such contract because of the caption of the letter, which is "Re: Interior Holdup Insurance--Charles W. Friedman," and also because the letter uses the word "assured" in reference to the application. The inference is not justified since as a matter of fact the evidence shows that such interpretation is contrary to the tenor of the whole letter, which is a refusal to contract rather than an acknowledgment of the existence of a contract.

An affidavit as to the nature of plaintiff's demand and the amount due was attached to the declaration. Defendant denied by the affidavit of merits that it entered into a contract of insurance with plaintiff. Defendant contends that since the affidavit of merits did not deny specifically the agency of Schlomann, plaintiff was relieved of the necessity of making such proof. Flaff v. Pacific Express Co., 251 Ill., 343, and McPherson v. Board of Education, 235 Ill. App. 426, are cited. They are not in point. The Flaff case holds that a default by defendant admitted an allegation of negli-

contract. In the first place, there is no proof that Schlosman was in any sense the authorized agent of defendant company. On the contrary, the proof is unauthenticated that he was the agent only of the broker Salem. Thus, the broker might make representations such as cited in Martin Store v. Hartford Insurance Co., 227 Ill. App. 102, have bound the agent of the broker company, but there were no such circumstances here nor circumstances such as existed in the other cases plaintiff cites, treating in fact agents. The whole evidence tends to prove that the application of plaintiff was simply submitted to the insurance company for its consideration, to be accepted or rejected after investigation. The evidence also shows that such application was made and the application rejected.

Plaintiff argues (with unnecessarily as it seems to us) that the letter of rejection tends to show that defendant orally accepted plaintiff's application. He argues the existence of such contract because of the caution of the letter, which is "Re: Interior Building Insurance--Charles V. Fridman," and also because the letter uses the word "assured" in reference to the application. The inference is not justified since as a matter of fact the evidence shows that such interpretation is contrary to the tenor of the whole letter, which is a refusal to contract rather than an acknowledgment of the existence of a contract.

An affidavit as to the nature of plaintiff's business and the amount due was attached to the declaration. Defendant denied by the affidavit of merits that it entered into a contract of insurance with plaintiff. Defendant contends that under the affidavit of merits did not deny specifically the agency of Schlosman, plaintiff was relieved of the necessity of making such proof. Fiatt v. Dwelling Insurance Co., 88 Ill. App. 88, and Robertson v. Board of Education, 238 Ill. App. 426, are cited. They are not in point. The Fiatt case holds that a defaulting defendant admitted an allegation of negli-

gence made in the declaration. The McPherson case holds that although an affidavit of merits did not deny specifically the amount of damages as alleged by the plaintiff, nevertheless the burden to prove such damages was on the plaintiff. Neither case sustains the contention of the plaintiff here.

Even if there was a conflict in the evidence, the finding of the court on the issue of fact would be entitled to the same weight in this court as the verdict of a jury. We would not be justified in setting it aside unless it were manifestly and clearly against the weight of the evidence, which it is not.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

[illegible] made in the deliberation. The majority have held that although an affidavit of merits did not deny absolutely the amount of damages as stated by the plaintiff, nevertheless the burden is given [illegible] on the plaintiff. Cases have adopted the construction of the statutory term.

Even if there was a modified to the evidence, the finding of the court on the issue of fact would be unlikely to the same weight in this court as the verdict of a jury. We would not be justified in setting it aside unless it was [illegible] against the weight of the evidence, which it is not.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

Kaplan and O'Connor, JJ., concur.

36891

BOLESLAW SHIMANIS and ANNA SHIMANIS, Executors under the Will of Nikolas Pauksztа, also known as Mike Pauksztа, Deceased,

Appellants,

vs.

WALTER KRECUNAS, also known as Walter Kraucunas,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 615

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In a suit by plaintiffs' executors upon a promissory note for the sum of $1500, and upon trial by the court there was a finding for defendant and judgment thereon.

The defense set up in the affidavit of merits is that defendant neither executed nor delivered the note. It is urged for reversal that the court abused its discretion in opening up the case for further evidence after the evidence had been closed and after the court had announced its finding, and in refusing to receive competent evidence offered by plaintiffs; and it is also urged that the judgment is against the weight of the evidence.

On the trial a former employee of the Peoples Bank and Trust Co., testified for plaintiffs that he drew this note on the date upon which it purports to be executed; that defendant and deceased at that time came to the bank and deceased withdrew $1500 from the savings account which he turned over to defendant. This witness further testified that defendant signed the note and handed it to the deceased in his presence. On cross examination the witness admitted that the purported signature of the wife of defendant was not on the note at this time, but testified that defendant said he would take the note home to have her sign it.

The note was received in evidence, plaintiffs rested, and the motion of defendant that the cause be dismissed for want of proof of delivery was denied.

In a suit by plaintiff, resulting upon a promissory note for the sum of $2,500, and upon trial by the court there was a finding for defendant and judgment thereon.

The defense set up in the affidavit of merits in that defendant neither executed nor delivered the note. It is urged for reversal that the court abused its discretion in opening up the case for further evidence after the evidence had been closed and after the court had announced its finding, and in refusing to receive competent evidence offered by plaintiff; and it is also urged that the judgment is against the weight of the evidence.

On the trial a former employee of the People Bank and Trust Co., testified for plaintiff that he drew this note on the date upon which it purports to be executed; that defendant appeared at that time come to the bank and borrowed eighteen $1,500 from the savings account which he owned over to defendant. This witness further testified that defendant signed the note and handed it to the deceased in his presence. On cross examination the witness admitted that the purported signature of the wife of defendant was not on the note at this time, but testified that defendant said he would take the note home to have her sign it.

The note was received in evidence, plaintiff rested, and the motion of defendant that the cause be dismissed for want of proof of delivery was denied.

Defendant was then sworn and denied that he signed the note and that he was at the bank with deceased at the time in question. Defendant rested, and the court then announced judgment would be entered for plaintiffs. The court afterward, however, opened up the case and allowed defendant to introduce the evidence of a writing expert, who testified in substance that in his opinion the signature to the note sued on was not the signature of defendant. Plaintiffs also produced an expert on handwriting who gave a contrary opinion, and the court then entered a finding for defendant, as already stated. Plaintiffs cite Herricks v. C. & E. I. R. R. Co., 257 Ill. 264, to the point that it was an abuse of discretion to open the case and permit the introduction of further evidence under the circumstances. That case is clearly distinguished from this by the fact that the trial there was by jury. When the trial is by the court the reason for the rule there announced does not exist.

The attorney of record for plaintiffs, after being duly sworn, stated he was the attorney for plaintiffs and that prior to the beginning of the suit defendant came to his office in response to a letter and told him that he owed this note and another one for $2000, making a total sum of $3500. This testimony was objected to by defendant and the objection was sustained; upon motion it was stricken out and plaintiffs duly excepted. Apparently the theory upon which this evidence was excluded was that the witness who was an attorney for plaintiffs was incompetent to testify in the case. That is not the law. It is not good practice for attorneys to testify in such cases, but they are competent witnesses if they choose to testify, and the fact of their relationship to the party whom they represent can then be shown for the purpose of discrediting their testimony. See Domm v. Hollenbeck, 259 Ill. 382, citing Bishop v. Hilliard, 327 Ill. 382, and Glanz v. Ziabek, 233 Ill. 22;

Defendant was then sworn and denied that he signed the note and that he was at the bank with deceased at the time in question. Defendant rested, and the court then announced judgment would be entered for plaintiffs. The court adjourned, however, upon the motion and request defendant to introduce the testimony of a writing expert, who testified in substance that in his opinion the signature to the note sued on was not the signature of defendant. Plaintiffs also produced an expert on handwriting who gave a contrary opinion, and the court then entered a finding for defendant, as already stated. Plaintiffs cite Sherman v. . . . . 2 Ill. App. 327 Ill. 561, to the point that it was an abuse of discretion to open the case and permit the introduction of further evidence under the circumstances. That case is clearly distinguishable from this by the fact that the trial there was by jury. Then the trial is by the court the reason for the rule there announced does not exist.

The attorney of records for plaintiffs, after being duly sworn, stated he was the attorney for plaintiffs and that prior to the beginning of the suit defendant came to his office in response to a letter and told him that he owed this note and another one for $500, making a total sum of $900. This testimony was objected to by defendant and the objection was overruled; upon motion it was stricken out and plaintiffs duly excepted. Assumingly the theory upon which this evidence was admitted was that the witness was an attorney for plaintiffs was incompetent to testify in the case. That is not the law. It is not good practice for attorneys to testify in such cases, but they are competent witnesses if they choose to testify, and the fact of their relationship to the party when they testify can then be shown for the purpose of discredit-ing their testimony. See Dunn v. Tallmadge, 328 Ill. 322, citing Stone v. Gilliard, 277 Ill. 183, and Ryan v. Ryan, 328 Ill. 87;

see also Powell v. Corbett, No. 36830, this day filed.

The executrix was produced for the purpose of proving a conversation with defendant concerning the note, but the court held that under the statute she was an incompetent witness and sustained an objection on the part of defendant to her testimony. It was held in Bailey v. Robison, 244 Ill. 16, that the disqualification under the statute is not against the party suing or defending as administrator, but against the party suing or defending adversely to the administrator.

For these errors in excluding evidence offered, the judgment must be reversed, and it will therefore be unnecessary to discuss the point strongly urged by plaintiffs that the judgment is against the weight of the evidence. We express no opinion on this point, but as the case must be tried again we call attention to the fact that the records of the bank might be useful in ascertaining the actual facts.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

see also *Vogel v. Gruaz*, 110 U.S. 311, 313 (1884).

The assertion was produced for the purpose of proving a conversation with defendant concerning the note, but the court held that under the circumstances the woman was incompetent; although no objection on the part of defendant to her testimony. It was held in *Tilton v. Beecher*, 59 N.Y. 10, that the disqualification under the statute is not against the party suing or defending as administrator, but against the party suing or defending adversely to the administrator.

In these cases to establish evidence offered, the judge must act by personal, and it will therefore be necessary to discuss the point strongly urged by plaintiff that the judgment is against the weight of the evidence. We express no opinion on this point, for as the case must be tried again we call attention to the fact that the records of the book might be useful in ascertaining the actual facts.

For the reasons indicated the judgment is reversed and the cause remanded.

DEVENDORF AND HERRICK.

Cause and Liberty, 11., author.

36584

HENRY J. OTTENSTROER,
Appellee,

vs.

THE BELT RAILWAY COMPANY OF CHICAGO, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

272 I.A. 615

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that he had received injuries while employed by defendant and upon trial had a verdict for $20,000; judgment for this amount was entered, from which defendant appeals.

The declaration charges in substance that defendant is engaged in interstate commerce; that on September 5, 1941, plaintiff, employed as a switchman, was riding on a freight car in defendant's yards when a grab iron or handle on top of the car was so loosely and insufficiently secured to the car that it became loosened and pulled out when plaintiff was holding onto it, causing him to be thrown off the car, sustaining severe injuries.

Defendant operates a hump at Clearing, Illinois, which is an elevation by which cars descend of their own weight down an incline onto certain tracks where trains are made up; at the top of the elevation a man in a tower controls switches which can divert a car going down the incline into the particular switch track into which it should go; the car proceeds of its own momentum down the incline and automatically goes into the proper switch track. A car rider or switchman rides down with the car and his sole duty is to keep the car under control by means of brakes and to permit it to couple up with cars which may already be in the switch track. It is about a quarter of a mile from the top of the incline to the far end of the yard.

Plaintiff was working for defendant as a switchman or car rider and on this occasion got on top of a refrigerator freight car

Case

ERNEST F. STEINBERGER,
Appellant,

vs.

THE ILLINOIS CENTRAL RAILROAD
CO. OF CHICAGO, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF
CHICAGO.

272 I.A. 615

Mr. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that he had received injuries while employed by defendant and upon trial had a verdict for $20,000; judgment for this amount was entered, from which defendant appeals.

The declaration charges in substance that defendant is engaged in interstate commerce; that on September 5, 1921, plaintiff, employed as a switchman, was riding on a freight car in defendant's yards when a crab iron or handle on top of the car was so loosely and improperly secured to the car that it became loosened and pulled out when plaintiff was holding onto it, causing him to be thrown off the car, wrenching severe injuries.

Defendant operates a yard at Glenwood, Illinois, which is an elevation by which cars are drawn or shove on switch tracks on locations such certain tracks where freight cars are made up; at the top of the elevation a man in a tower controls switches which can direct a car going down the incline into the particular switch track into which it should go; the car proceeds of its own momentum down the incline and automatically goes into the proper switch track. A car also or switchmen ride down with the car and his duty is to keep the car under control by means of brakes and to permit it to couple up with cars which may already be in the switch track. It is about a quarter of a mile from the top of the incline to the far end of the yard.

Plaintiff was working for defendant as a switchman or car rider and on this occasion got on top of a refrigerator freight car

as it went over the hump and started on its journey down the incline; he took his position at the forward end of the car at the wheel brake, standing on a small platform which was a short distance below the top of the car; he was using a hickory brake stick, which is placed between the spokes of the brake wheel and against the brake shaft and thus greater pressure could be exerted on the wheel than by the ordinary pull of the hand. At this end on top of the car are trap doors used for placing ice and for ventilation; near this brake wheel and slightly to the left as the brakeman faced the wheel was a five-eighths inch round metal bar bolted at each end to the top of the car with bolts about twelve inches apart and raised above the roof in a somewhat circular manner about four inches from the roof; it was this iron plaintiff says he was grasping with one hand when it pulled out at the bolt hole nearest the edge of the car. Defendant earnestly argues that this piece of iron was not a grab iron or handle iron, but was designed solely as a guard to protect a nearby grab iron from the metal arm used in raising and lowering the trap door. Whatever may have been its primary purpose, there was sufficient evidence that it was universally used as a hand-hold or grab iron, so that an employee could hold himself safely while setting the brake.

Plaintiff testified that as he went into the switch track at the bottom of the incline he had his brake pretty tightly set; that when he was four or five feet from the other car already on the track, his car started to slow down, that he wished to release the brake and took hold of the grab iron with one hand and used the stick for the brake, pulling hard with the other hand, when the grab iron pulled out at the bolt end nearest him and he fell against the other car, striking his head. It was not denied that there was a strip of wood missing from the roof about thirteen inches long and an inch wide running from one of the bolt holes to the edge of the

as it went over the bump and started on its journey down the incline; he took his position at the forward end of the car at the wheel brake, standing on a small platform which was a short distance below the top of the car; he was using a hickory brake stick, which is placed between the spokes of the brake wheel and against the brake shaft and thus greater pressure could be exerted on the wheel than by the ordinary pull of the hand. At this end on top of the car were trap-doors used for placing ice and for ventilation; near this brake wheel and slightly to the left as the brakeman faced the wheel was a five-eighths inch round metal bar bolted at each end to the top of the car with bolts about twelve inches apart and raised above the roof in a somewhat circular manner about four inches from the roof; it was this iron plainly seen by the brakeman with one hand when it pulled out at the bolt hole nearest the edge of the car. Deceased accordingly stepped out with plenty of iron and not a grab iron or handle iron, but was designed solely as a guard to protect a nearly grab iron from the motor men and in washing and repairing the car roof. Witness has been in railroad business, from the evidence appears that it was ordinarily used as a hand-hold or grab iron, so that an employee could hold himself safely while setting the brake.

Plaintiff testified that as he went into the switch track at the bottom of the incline he had his brake pretty tightly set; that when he was four or five feet from the other car already on the track, his car started to slow down, that he aimed to reverse the brake and took hold of the grab iron with one hand and used the stick for the brake, pulling hard with the other hand, when the grab iron pulled out at the bolt and measured his and he fell against the other car, stabbing his head. It was not denied that there was a strip of wood missing from the roof about thirteen inches long and an inch wide running from one of the bolt holes to the edge of the

roof so that the bolt could easily be lifted out, also that the wood was rotten where the bolt fitted in. Immediately after the accident the car was sent to the shop to have this place repaired. The jury could properly conclude that the accident happened as described by plaintiff, and that the negligence charged was proven.

Plaintiff did not assume the risk. There is nothing in the record to indicate that plaintiff ever before saw the car upon which he was riding when injured. It is a well established rule that an employee does not assume the risk unless he has actual or constructive knowledge of the danger. This is supported by many decided cases. Knox v. American Rolling Mill Co., 236 Ill. 437, and many others.

We have a more serious problem in endeavoring to reconcile the amount of the verdict with the injuries plaintiff received. We are constrained to hold that $20,000 is excessive, that it cannot be cured by a remittitur, and that there must be a new trial.

Plaintiff says that when he fell down between the two cars he struck his head against the other car and became unconscious, although he says he remembers that a fellow workman assisted him in going over to a trolley car defendant operates to carry employees from the bottom of the incline to the top. The trolley operator testified that plaintiff got on the trolly without help and while it was moving and that at this time he apparently was not injured and did not act like an injured man; there were no scratches, bruises or marks on his body showing injuries. Although plaintiff testified that he was unconscious for some time, the evidence shows that he returned to the top of the hump within about the usual time for making the trip from the top to the bottom and return. Plaintiff says that when he got to the top he sat down, feeling dizzy. A number of witnesses saw him at this time and say they saw nothing unusual about him; that he walked down from the hump by the steps

that so that the hoist could easily be lifted out, although the rope was taken where the hoist lifted in. Immediately after the accident the car was sent to the shop to have this place repaired. The jury could properly conclude that the accident happened as described by plaintiff, and that the negligence charged was proven.

Plaintiff did not assume the risk. There is nothing in the record to indicate that plaintiff ever before saw the car upon which he was riding when injured. It is a well established rule that an employee does not assume the risk which is due without or unknown to the employer. This is supported by every leading case. Shea v. American Smelting Ref. Co., 68 Ill. App. and many others.

We have a more serious problem in endeavoring to reconcile the amount of the verdict with the injuries plaintiff received. We are constrained to hold that $80,000 is excessive, but it cannot be cured by a remittitur, and that there must be a new trial.

Plaintiff says that when he fell down between the top cars he struck his head against the floor of the car and became unconscious, although he says he remembers that a fellow workman assisted him in going over to a trolley car defendant operates to carry employees from the bottom of the incline to the top. The trolley operator testified that plaintiff got on the trolley without help and while it was moving and that at this time he apparently was not injured and did not act like an injured man; there were no contusions, bruises or marks on his body showing injuries. Although plaintiff testified that he was unconscious for some time, the evidence shows that he returned to the top of the hoop within about the usual time for making the trip from the top to the bottom and return. Plaintiff says that when he got to the top he sat down, feeling dizzy. A number of witnesses saw him at this time and say they saw nothing unusual about him; that he walked down from the hoop by the steps

to the ground and went toward his automobile; the yardmaster called to him, asking what was the matter; plaintiff did not reply but walked faster and got into his car and drove away. The yardmaster went to plaintiff's residence and inquired if plaintiff was injured; he was refused admittance and was told that plaintiff was not at home although plaintiff's automobile was standing in front of the house. Defendant's doctor called to see him but plaintiff's wife was instructed to tell the doctor that plaintiff was not at home. Plaintiff says he stayed in bed for two days after the accident but on the third day went to the office of Mr. McCallum, his attorney, who sent him to Dr. Orlando Scott who examined him and took some X-ray pictures of him.

The following month plaintiff went by train to Minnesota and was there two or three weeks on a farm owned by him; he then came home to Chicago and later went to Grand Haven, Michigan, to visit an uncle, staying there for about a month; he saw a doctor only once that winter and took no medicine; the following spring he went to his farm in Minnesota, staying there about a month, driving in an automobile; upon his return he drove an automobile truck part of the way; he stayed in Chicago a few days and then returned to his farm in the truck; he remained on the farm all summer. A neighbor at the farm testified that she saw him unload his furniture from the truck; that he was walking back and forth to town; that she saw him plowing, dragging the field with a spring-tooth rake, working four or five days cleaning up the field; that he cultivated corn, cut grass, put up hay and loaded it, stood on the hay rack and put the hay in the barn; he also did the usual work about threshing grain; that she saw him chasing some cows that got away and says that for a big man he was a pretty good runner.

Aside from the testimony of plaintiff as to his symptoms, the contest as to the extent of the injuries centered in the testi-

to the ground and went toward his automobile; the yardmaster called to him, asking what was the matter; plaintiff did not reply but walked faster and got into his car and drove away. The yardmaster went to plaintiff's residence and inquired if plaintiff was injured; he was refused admittance and was told that plaintiff was not at home although plaintiff's automobile was standing in front of the house. Defendant's doctor called to see the wife plaintiff's wife was instructed to tell the doctor that plaintiff was not at home. Plaintiff says he stayed in bed for two days after the accident but on the first day went to the office of Dr. McCollum, his attorney, who sent him to Dr. Grimes that he examined him and took some X-ray pictures of him.

The following month plaintiff went by train to Minnesota and was there two or three weeks on a farm owned by him; he then came home to Chicago and later went to Grand Haven, Michigan, to visit an uncle, staying there for about a month; he saw a doctor only once that winter and took no medicine; the following spring he went to his farm in Minnesota, staying there about a month, driving in an automobile; upon his return he drove an automobile truck part of the way; he stayed in Chicago a few days and then returned to his farm in the truck; he remained on the farm all summer. A neighbor at the farm testified that one day she noticed his furniture from the truck; that he was walking back and forth to town; that she saw him plowing, dragging the field with a spring-tooth harrow, working four or five days planting on the field; that he mistreated one, his horse, put on harness and loaded it, stood on the hay rack and put the hay in the barn; he also did the usual work about threshing grain; that she saw him chasing some cows that got away and says that for a big man he was a pretty good runner.

Aside from the testimony of plaintiff as to his symptoms, the contest as to the extent of the injuries centered in the testi-

mony of physicians testifying in part from X-ray pictures. They testified that the sella turcica, or what is called the Turk saddle, is situated on the floor of the human skull about three and one-half inches back of the temple and about two and one-half inches from either side; that in this saddle or depression is the pituitary gland, which gland regulates growth; that the pictures of plaintiff taken after the accident apparently show a sharp spicula of bone extending down the posterior border of the clinoid process, a fracture in the sella turcica and an abnormal condition of the clinoid processes The clinoid processes are the front and back parts of the saddle in which the pituitary gland lies. All the physicians agree as to the importance of the pituitary gland; that interference with its normal functioning causes changes in the appearance of the face and the expression, the feet become enlarged and the sexual power is almost universally weakened and ultimately destroyed, so that the power of having sexual relations is lost.

Defendant took X-ray pictures of its employees when they were first employed and had such pictures taken of plaintiff long prior to the date of the accident; the physicians, including some of those who testified on behalf of plaintiff, when shown the two sets of pictures - that is, those taken prior to the accident and those taken subsequently - testified that the condition of the sella turcica and other abnormal appearances in this area were the same in both sets of pictures. Plaintiff's counsel sought to break the force of this testimony by developing the fact that the respective pictures were not taken from the same angle. If this is true, it would not be difficult to take an X-ray picture showing conditions as they are at present, taken at the same angle as the picture taken prior to the accident.

Plaintiff says that in 1928 he was taken ill with rheumatism for about two weeks and also had his tonsils removed;

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Plaintiff says that in 1926 he was taken ill with pneumonia for about two weeks and also had his tonsils removed;

he also had pyrrhoea and had all his teeth pulled; he had served in the army and in 1919 made application to the United States Government for compensation on account of disability following his illness; at the time of the trial and for over two years he had been receiving $22.50 a month as compensation because the rheumatism caused his fingers, wrists and ankles to swell. There was evidence that the enlarged condition of his hands, feet and wrists was caused by rheumatism.

The physicians testified that when a man receives an injury sufficient to fracture the sella turcica, he is, as a rule, knocked unconscious, which continues many hours, sometimes several days; that he is immediately and thoroughly disabled, in a state of profound shock, and cannot get around by himself. This can hardly be reconciled with the conduct of plaintiff immediately following the accident, when, as the witnesses say, they saw nothing unusual about him.

Much of the argument is concerned with plaintiff's claim that he has lost the power of having sexual relations and that his genitals have shrunken. The physicians who examined him say they saw nothing abnormal in this respect. After the case had been submitted to this court by oral argument and briefs, the attorney for defendant presented a motion asking that the case be dismissed or reversed, basing this motion upon certain documents showing that within three months after the trial plaintiff's wife gave birth to a son; the documents show that this is the fact; counter suggestions were filed on behalf of plaintiff in which the birth of the child at the time stated is not controverted. We can find no precedent for presenting to this court such newly discovered evidence. The motion will therefore be denied. Upon the next trial evidence of the facts in this connection should be presented to the jury.

Plaintiff's claim of injuries rests largely upon opinion evidence given in answer to hypothetical questions, based upon reading of X-ray pictures, about one of the endocrine glands whose particular reaction to injuries is only partially known and which lies in a field as yet still under exploration and study by physicians. On the other hand is the picture of a man apparently in normal health, moving about as usual and doing the customary farming work of an able bodied man. We hold that the more convincing evidence tends to prove the conditions presented by the latter picture.

Defendant's counsel complains that the attitude of the trial Judge was prejudicial to him. Many of the things complained of took place outside of the presence of the jury and errors in this respect, if any, will probably not occur again.

It is said that the court erroneously refused to admit in evidence or permit the projection of a moving picture of the plaintiff. Photographs have long been admitted after proper preliminary proof as to exactness and accuracy, and logically, under the same circumstances, motion pictures should be admitted. As was said in Commonwealth v. Roller, 100 Pa. Super. Ct. 125, "The novelty of the talking motion picture is no reason for rejecting it if its accuracy and reliability, as aids in determination of the truth, are established." In the present case, however, counsel for defendant does not show that the moving pictures were material. We understand from the briefs that they purported to show plaintiff while walking to the court house and that he was walking without a limp. Plaintiff does not claim to have walked with any limp or to have received any leg injury; so the picture would not contradict him nor would it in any way impeach him. The moving picture was therefore immaterial and it was not error to rule against it.

It is said that the court improperly refused to give de-

Plaintiff's claim of injuries rests largely upon opinion evidence given in answer to hypothetical questions, based upon reading of X-ray pictures, about one of the moving pictures whose admissibility rests on injuries is only partially known and which like in a field as yet still under evaluation and study by physicians. In this case that is the question of a sore somewhat in appearance, merely meant to show the causing the continuing freely very of an able bodied man. We hold that the more conclusive evidence needed to prove the conditions presented by the lower plaintiff.

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It is said that the court improperly refused to give defendant's

fendant's instruction No. 15. This in substance told the jury that if the defects on the car were open and obvious and fully known to plaintiff, and if he knew the risks incident thereto, plaintiff voluntarily assumed the risk. Plaintiff testified he did not notice the defect until the handle pulled out. The instruction was not applicable to the facts and was properly refused.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, J., concurs.

Matchett, P. J., specially concurring: I concur, but not in what is said in the opinion as to the admissibility of motion pictures in cases of this kind.

Tenour's instruction Ex. 17. This is substance 1d1 the jury that if the defendants on the 2nd Tuesday were and wherein and fully aware, to plaintiff, and if he knew the right landlord thereto, plaintiff reasonably assumed the case. CONSULT instead he did not notice the defect until the handle pulled out. The instruction was not applicable to the facts and was properly refused.

For the reasons indicated the judgment is reversed and the cause remanded.

BURNETT AND DONOVAN.

O'Connor, J., concurs.

Hanna, P. J., specially concurring: I concur, but not in what is said in the opinion as to the admissibility of motion pictures in cases of this kind.

36605

ARCHIE I. BERNSTEIN and ISADOR BECKER,
Defendants in Error,

vs.

ABE ALLEN et al.,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

272 I.A. 615

MR. JUSTICE McBURNEY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit alleging a written contract wherein defendants agreed to pay them $10,000 for legal services and upon trial before a jury had a verdict and judgment for $10,000. Defendants bring the record to this court by writ of error, asking for a reversal. The brief for defendants should have observed Rule 19 of this court.

The case was tried upon a wrong theory of the law and as there must be a retrial we note only the important points presented.

Plaintiffs, who are attorneys, rested their case upon a writing in which defendants agreed to pay plaintiffs, under certain conditions, $10,000 for services as their attorneys in a suit for specific performance brought against them by David Brandwein. The case was tried upon the theory that this was an absolutely binding contract. If the contract was made while the relation of attorneys and clients existed, the burden was on the attorneys to prove the reasonableness of the compensation named in the contract for the services rendered. In Elmore v. Johnson, 143 Ill. 513, the opinion quoted with approval from the English rule that an attorney cannot bind his client by contract to make him pay greater compensation for his services than he would have a right to demand if no contract should be made. This has been followed in Robinson v. Sharp, 201 Ill. 86; Moore v. Robinson, 92 Ill. 491; Thompson v. Reynolds, 73 Ill. 11; Royle v. Read, 138 Ill. App. 153; Pratt v. Kerns et al., 123 Ill. App. 86; Poppers v. Scheenfeld, 97 Ill. App. 477; Gruby v.

Smith, 13 Ill. App. 43; Jennings v. McConnel, 17 Ill. 148; Ringen v. Ranes, 263 Ill. 11.

This being the rule, it is of primary importance to determine when the contract was made and when plaintiffs were employed as attorneys for defendants. The contract is dated May 21, 1929; Mr. Bernstein, one of the plaintiffs, was the attorney for the defendants for some considerable time before this; he had known them for a long time and had acted for them as their attorney in other matters prior to this contract; in September, 1928, he represented them in making a contract whereby they agreed to sell certain real estate to Brandwein; subsequently, in the same month he had a conference with them in which they told him that because of certain matters coming to their attention they wished to avoid their contract with Brandwein; Bernstein advised them with reference to this and discussed steps to be taken if a suit for specific performance should be brought against them.

March 6, 1929, Brandwein filed his bill asking that defendants be decreed to perform their contract to convey the real estate to him and March 20th Bernstein filed in that suit the appearance of Sarah and William Levin, two of the defendants herein, and of himself as their solicitor. Mr. Hagen, an attorney, represented four of the other defendants in the Brandwein suit. A discussion arose as to whether another attorney should be retained instead of Mr. Hagen; April 15, 1929, Mr. Hagen withdrew and Mr. Bernstein recommended Mr. Isador Becker, the co-plaintiff herein, to act as associate counsel; Bernstein was asked to consult with Becker and inform defendants of the result; on the Sunday following the date when Mr. Hagen withdrew, Bernstein consulted with Becker and reported to his clients that Becker was of the opinion that defendants had a good defense to the Brandwein suit and that Bernstein and Becker would go ahead and take care of the same and that the charges would

Smith, 37 Ill. App. 49; *Tomlinson v. Armour*, 47 Ill. 144; *Haines v. Young*, 141 Ill. 11.

While being the rule, it is of primary importance to determine when the contract was made and when plaintiffs were employed as attorneys for defendants. The contract is dated May 23, 1920; Mr. Bernstein, one of the plaintiffs, was the attorney for the defendants for some considerable time before this; he had known them for a long time and had acted for them as their attorney in other matters prior to this contract; in September, 1920, he represented them in making a contract whereby they agreed to sell certain real estate in Kansas; subsequently, in the same month he had a conference with them in which they told him that because of certain matters coming to their attention they wished to avoid their contract with Brownstein; Bernstein advised them with reference to this and discussed steps to be taken if a suit for specific performance should be brought against them.

March 2, 1921, Brownstein filed his bill seeking that defendants be decreed to perform their contract in conveying the real estate to him and March 8th Bernstein filed in that suit the appearance of Baum and Willing Davis, two of the defendants herein, and of Aldredge as their solicitor. Mr. Hagen, an attorney, represented four of the other defendants in the Brownstein suit. A discussion arose as to whether another attorney should be retained instead of Mr. Baum; April 13, 1921, Mr. Hagen withdrew and Mr. Bernstein recommended Mr. Isador Becker, the co-plaintiff herein, to act as associate counsel; Bernstein was asked to consult with Becker and inform defendants of the result; on the Sunday following the date when Mr. Hagen withdrew, Bernstein consulted with Becker and reported to his clients that Becker was of the opinion that Bernstein had a good defense to the Brownstein suit and that Bernstein and Becker would go ahead and take care of the case and that the charges would

be reasonable. Both plaintiffs testified to a meeting with certain of the defendants April 23rd, in which they say Becker stated he wanted $10,000 to defend the Brandwein suit; defendants denied this; April 24, 1929, Becker entered his appearance jointly with Bernstein as attorneys for the defendants in the Brandwein suit.

As we have said, the contract is dated May 21, 1929. Plaintiffs sought to show that it was executed some time before this date but the testimony of defendants tended to show that it was signed at about the date it bears; some of the witnesses testified that some of the signatures were not obtained until after this date.

The contract is in typewriting, except the last clause, and is "Dated at Chicago, Illinois this 21st day of May A.D. 1929." The day of the month was inserted in handwriting in the blank space for this purpose. This would be strong evidence that it was executed on or about this date and almost convincing evidence that it was not drawn up in April as plaintiffs argue.

The contract purports to employ Bernstein and Becker as the attorneys for the defendants in the Brandwein suit then pending in the Circuit court of Cook county, and proceeds: "In consideration of your services rendered and to be rendered we hereby jointly and severally promise and agree to pay you the sum of Ten Thousand ($10,000.00) Dollars." The phrase, "In consideration of your services rendered" is consistent only with the fact that Bernstein and Becker had theretofore been engaged as attorneys and had rendered services, and that the relation of attorneys and clients existed prior to the making of the contract.

Upon the next trial the jury should be instructed that if it finds that the contract was made while the relation of attorneys and clients existed, then the burden is upon the plaintiffs to prove that the compensation named in the contract is reasonable and fair.

The contract purported to obligate the defendants to pay

be transmitted. This plaintiff testified to a meeting with attorneys of the defendants until May, in which they had tendered payment of $12,000 to defend the Brownsville suit; defendants denied this; April 24, 1919, Bowker entered his appearance jointly with defendants as attorneys for the defendants in the Brownsville suit.

As we have said, the contract is dated May 1, 1919. Plaintiff's counsel in stating that it was executed some time before this date but the testimony of defendants tended to show that it was signed at about the date it bears; some of the witnesses testified that some of the signatures were not obtained until after this date.

The contract is in typewriting, except the last clause, and is dated at Chicago, Illinois this 21st day of May A.D. 1919."

The day of the month was inserted in manuscript in the blank space for this purpose. This would be strong evidence that it was executed on or about this date and almost conclusively evidence that it was not drawn up in April as plaintiff argue.

The contract provides in substance that defendants are the attorneys for the defendants in the Brownsville suit upon condition the Circuit Court of Cook County, not precedent: "In consideration of your services rendered and to be rendered we hereby jointly and severally promise and agree to pay you the sum of Ten Thousand ($10,000.00) Dollars." The phrase, "in consideration of your services rendered" is consistent only with the fact that defendants had theretofore been employed as attorneys and had rendered services, and that the relation of attorneys and clients existed prior to the making of the contract.

Upon the most total the jury should be instructed that if it finds that the contract was made while the relation of attorneys and clients existed, then the burden is upon the plaintiff to prove that the compensation named in the contract is reasonable and fair.

The contract purported to obligate the defendants in any

$10,000 to the attorneys in the event they "successfully defend said suit, or procure a dismissal thereof." It is argued by the defendants that plaintiffs failed to perform either of these conditions. Answers on behalf of the defendants were filed in the Brandwein suit in May, 1929, and the cause was referred to a master in chancery; there the case slept; no testimony was ever heard before the master; on October 7, 1931, nearly a year and a half after answers were filed, the complainant of his own motion had his bill dismissed. The reason for this was evidently the slump in the price of real estate subsequent to making his contract to buy. Under the circumstances plaintiffs cannot be said to have either successfully defended the suit or procured a dismissal thereof.

Defendants offered to prove by attorneys the reasonable value of the services rendered in the Brandwein suit but such evidence was held inadmissible, the court saying that the case must be decided upon the written agreement and not upon a question of reasonable charges for services. This ruling was error.

Defendants argue that the failure of plaintiffs to file a cross bill in the specific performance suit damaged them and that they are entitled to recoup their loss in the instant suit. This contention will not stand examination. Defendants contracted in March, 1929, to sell the real estate for $75,000; shortly thereafter they heard rumors of enhanced values in the neighborhood; concluding that they had contracted to sell at too low a figure they employed plaintiffs to beat their contract; their answers alleged that they were induced to sign the contract by fraud, hence it was void. As the real estate market depreciated they were less anxious to avoid their contract; finally the market price of the real estate under contract fell to $60,000, or $15,000 less than their contract price; defendants say that when this happened they

$\$2,000$ in the alternative to the usual duty "conservatively defined with, or procure a financial tenant." It is argued by the defendants that plaintiffs failed to perform either of these conditions. Memoranda on behalf of the defendants were filed in the Superior Court in May, 1970, and the cause was referred to a master in chancery; there the case stood; no testimony was ever heard before the master; on October 7, 1971, nearly a year and a half after memoranda were filed, the stipulation of the motion had been filed (signed). The reason for this was probably the change in the price of real estate subsequent to making the contract in suit. Thus the plaintiffs contend it would be now higher unconscionable defeated the suit or procured a financial tenant.

Defendants offered to prove by witnesses, the reasonable value of the surplus property in the Brookside suit but also evidence was held inadmissible, the court ruling that the case must be decided upon the written agreement and for such a question of reasonable damages for breaches. This ruling was error.

Defendants argue that the failure of plaintiffs to file a bond in the specific performance suit caused them not that they are entitled to recover their loss in the Brookside suit. This contention will not stand examination. Defendants contracted in March, 1970, to sell the real estate for $\$75,000$; shortly thereafter they found number of numerous values in the neighborhood; contending that they had contracted to sell at too low a figure they engaged plaintiffs to find their tenant; their memoranda disclosed that they were interested in selling the property for rent, hence it was said. As the real estate market fluctuated they were less anxious to avoid their contract; finally the market value of the real estate under contract fell to $\$67,000$, or $\$12,000$ less than their contract price; defendants say that when this happened they

requested their attorneys, the plaintiffs herein, to file a cross bill to compel Brandwein to perform his contract of purchase at $75,000 but plaintiffs refused, hence defendants lost $15,000. The proposition falls from its own weight. Defendants having alleged fraud in the making of the contract could not consistently "about face" and seek to enforce it.

Both parties re-argue the motion heretofore made in this court to strike the bill of exceptions, which motion has already been denied; that water has already gone over the dam.

The greater weight of the evidence proves that the contract for attorneys' fees was made while the relation of attorneys and clients existed, and plaintiffs have not proven that the reasonable value of their services is the amount named in the contract. The evidence also shows that the services named in the contract, for which plaintiffs were to receive $10,000, were not performed by them. Plaintiffs are entitled to recover what the services rendered are reasonably worth and evidence of this should be heard.

The judgment is reversed and the cause is remanded for further proceedings consistent with what we have said herein.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

Reporters Guide statement, the plaintiffs herein, to file a brief bill to enjoin Thompson to perform his contract of purchase at $75,000 but plaintiffs refused, based defendants that $75,000 was plaintiffs refused, because defendants that the consideration fails from the one subject. Defendants having signed from in the making of the contract could not successfully "about face" and seek to enforce it.

This petition re-plays the motion defendants made in this court to strike the bill of exceptions, which action has already been denied; that order has already been the law.

The greater weight of the evidence proved that the property for strangers' loss was made with the relation of attorneys and clients made, and plaintiffs have not proven that the reasonable value of their services in the amount named in the contract. The evidence also shows that the services named in the contract, for which plaintiffs were to receive $75,000, were not performed by them. Plaintiffs are entitled to recover only the reasonable value of their services. Defendants are reasonably worth and evidence of this should be taken.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

DEFENDANT'S EXCEPTIONS.

Reversed, R. J., and Gilbert, J., concur.

36609

PATRICK MOYLAN,
Plaintiff in Error,

vs.

FELIX COUNE and FRANKLIN BERGENTHAL,
Defendants in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

93

272 I.A. 615

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error plaintiff seeks the reversal of an adverse judgment entered on the verdict of a jury upon the trial of a cause wherein he sought compensation for personal injuries received in a collision between two automobiles.

The accident happened on the morning of May 11, 1931, at the intersection of Clark street, which runs North, with Addison street, which runs east, in Chicago; at the intersection of these streets are signs alternating green, yellow and red lights; traffic proceeds when faced by the green light and stops when faced by the red light.

On the morning of May 11, 1931, plaintiff was riding as a guest in the automobile owned and driven by Felix Coune, one of the defendants, going east on Addison street; as it was crossing the intersection of Clark there was a collision with a north-bound automobile driven by Franklin Bergenthal, a defendant, resulting in serious injuries to plaintiff.

Plaintiff originally named as defendants Felix Coune, Franklin Bergenthal and the Red Star Yeast & Products Company, a corporation; at the end of plaintiff's case in chief he dismissed as to the last named defendant as he was unable to produce any evidence that the corporation owned the automobile which Bergenthal was driving; the case was submitted to the jury with Coune and Bergenthal the only defendants.

Plaintiff alleged that the accident was caused by the wilful, wanton and malicious conduct of Felix Coune in operating his automo-

Same

PATRICK ATTLEE,
Plaintiff in Error,

vs.

ERNEST CLOUGH and THEODORE CHAPMAN,
Defendants in Error.

ERROR TO DETROIT CITY
COURT, WAYNE.

272 1.4.615

Mr. Justice WARNER delivered the opinion of the court.

By this writ of error plaintiff seeks the reversal of a judgment entered on the verdict of a jury from the trial of a tort action to which proceedings for criminal injury proceeded in a collision between two automobiles.

The accident happened on the morning of May 11, 1931, at the intersection of Jefferson avenue, which runs east, in chicago; at the intersection of Chene street, which runs east, in chicago; at the intersection of these streets are eight alternating green, yellow and red lights; traffic proceeds when freed by the green light and stops when faced by the red light.

On the morning of May 11, 1931, plaintiff was riding as a guest in the automobile owned and driven by Felix Chene, one of the defendants, going east on Jefferson avenue; as it was approaching the intersection of Chene there was a collision with a north-bound automobile driven by Theodore Chapman, a defendant, resulting in serious injuries to plaintiff.

Plaintiff originally sued ex delicto Felix Chene, Theodore Chapman and the Ind Star Taxi & Transfer Company, a corporation; at the end of plaintiff's case it could be discovered as in the last named defendant is the owner entitle to produce any evidence that the corporation under the automobile which Chapman was driving the same was considered in the Ind star-Chene was Chapman the only defendant.

Plaintiff alleged that the accident was caused by the willful, wanton and reckless conduct of Felix Chene in operating his automo-

bile; there was no charge of general negligence against Coune; the other defendant, Bergenthal, was charged only with ordinary negligence.

At the conclusion of plaintiff's evidence both defendants, respectively, requested the court to instruct the jury that he be found not guilty. Both motions were denied. Coune elected to stand by his motion and introduced no evidence. Bergenthal proceeded to introduce evidence tending to show that he was not negligent as charged. When a defendant stands by his motion for a directed verdict in his favor and does not introduce any evidence, his case must be determined as it existed at the time his motion was made. Gordon v. Schoenfeld, 214 Ill. 226; Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249; Cook v. Aeyermann, 244 Ill. App. 644. The jury was instructed in substance that as Coune had rested his case at the close of the case for the plaintiff, the jury could consider only the evidence as received on behalf of the plaintiff in determining whether or not the defendant Coune "is guilty or not guilty of willful and wanton conduct as charged in plaintiff's declaration," and that evidence offered on behalf of the defendant Bergenthal must not be considered in passing upon the guilt of Coune. Plaintiff in this court makes no objection to the giving of this instruction.

Did the evidence on behalf of plaintiff show that Coune was guilty of willful and wanton operation of his automobile? Coune, the defendant, testified on behalf of plaintiff. He said that on the occasion in question he was taking plaintiff and his wife to plaintiff's home; that plaintiff sat beside Coune in the front seat and that Mrs. Meylan sat with Mrs. Coune on the rear seat; they were going east on Addison street at the rate of 15 to 18 miles an hour; as he came to the intersection of Clark street the lights were green and as they were crossing the intersection they were struck by the

alibi; there was no showing of personal negligence against Jones; the other defendants, Dangerfield. The counsel made this argument. Judgment.

As the evaluation of plaintiff's evidence has definitely, respectively, compelled the court to listening the jur, that he, he found not guilty. Such motions were denied. Jones appeared on behalf by his motion and introduced no evidence. Dangerfield presented in introduce evidence tending to show that he was not negligent at the meeting. When a defendant pleads by his motion for a verdict in his favor and does not introduce any evidence, his case must be determined on it merits on the time his motion was made. Carlson v. Stanchfield, 214 Ia. 1048; Jones v. Chicago Northwestern Ry. Co., 214 Ia. 1047; Cook v. Cunningham, 214 Ia. 1044. The jury was instructed to exclude from its consideration evidence that Jones at the close of the case for the plaintiff, the jury could consider only the evidence as material on behalf of the plaintiff in determining whether or not the defendant Jones "is guilty or not guilty of willful and wanton conduct in causing to plaintiff's destruction," and that evidence offered on behalf of the defendant Dangerfield must not be considered in passing upon the guilt of Jones. Plaintiff in his brief made no objection to the giving of this instruction.

The evidence on behalf of plaintiff show that Jones was guilty of willful and wanton negligence of his non-action. Jones, the defendant, insisted on proof of plaintiff. He said that in the occasion in question he was taking plaintiff and his wife to plaintiff's home; that plaintiff had built house in the front and that the, Dayton and wife die. Jones on his case said, they had going over on Addison street on the top of it to it mean on hunt; as he came to the intersection of Clark street the lights were red as they were driving. An intersection they were stopped by the

other car going north on Clark street. Plaintiff testified that as Coune's car approached Clark street the green lights were on for east and west traffic on Addison street and that suddenly "a black streak" came up from the south on Clark street and struck them. William Coleman, driving an automobile east on Addison street just behind Coune's car, testified that the lights were green for east and west traffic; that as he was just about up to the intersection the lights started to turn red and witness stopped his car. As this was all the essential evidence in the case when defendant Coune made his motion for an instructed verdict it would seem to be self-evident that there was no evidence to support the charge of malicious, wilful and wanton operation of Coune's automobile. The trial court should have allowed Coune's motion for an instructed verdict in his behalf. The jury has returned a verdict of not guilty as to Coune, which was fully justified from the evidence produced on behalf of the plaintiff.

There was sufficient evidence produced on behalf of Bergenthal to justify the jury in finding that as he approached the intersection the green lights were in his favor and that he was not negligent in crossing the intersection. Teresa Campbell saw the accident; she was sitting in the front seat of her automobile going west on Addison street; as she approached Clark the light was green for east and west traffic but as she drew nearer to Clark the lights changed and she stopped her car; she saw the car driven by Coune when the green light was facing Clark street and the red light on Addison; she saw Coune's car going through the red light, crossing Clark street going east. Her friend, Bertha Miller, who was riding in the same automobile, testified that when their car stopped at Clark street for the red light they noticed the other car coming east on Addison going through the red light. Another witness was in an automobile going north on Clark about fifteen feet behind Bergenthal's car; he testified that when that car started to cross Addison the traffic lights were green for north

other are going north on Clark street. Plaintiff testified that as Johnson's car approached Grace across the green lights went on for east and west traffic on Addison street and that suddenly "a flash started" came up from the south on Clark street and struck them. Witness Coleman, driving an automobile east on Addison street just behind Johnson's car, testified that the lights were green for east and west traffic; that as he was just about to go in the intersection the lights started to turn red and without slowed his car. He said was all the material evidence in the case upon defendant's case made his motion for an instructed verdict it would seem to be self-evident that there was no evidence to support the charge of negligence, which was sudden operation of Johnson's automobile. The trial court should have allowed Johnson's motion for an instructed verdict in his behalf. The jury has returned a verdict of not guilty as to Grace, which was fully justified from the evidence produced on behalf of the plaintiff.

There was sufficient evidence presented to justify the jury in finding that as to appellant the intersection the green light was in his favor and that he was negligent in crossing the intersection. Between Johnson's car and Grace's car, one was driving in the front seat of her automobile going east on Addison street; as the approached Clark the light was green for east and west traffic but as the Grace car began to cross the lights changed and she stopped her car; she car was driven by Grace when the green light was facing Clark street and the red light on Addison; she saw Johnson's car coming through the red light, approaching Clark street going west. Her testimony testified, she was going to the Grace automobile, testified that when Grace driving through at Clark street the red light had changed to green for the east and west traffic and Johnson was in an intersection going north on Clark when the green light for the east and west traffic was green for north and south traffic. Johnson's car was in motion going through the red light. Another witness was in an automobile going north on Clark when Johnson's car left the curb and testified that when the car started from Addison the traffic lights were green for north

and south traffic; that he saw the other car going east on Addison through the red light. A number of other witnesses, including the defendant Bergenthal, testified to the same effect; that Bergenthal's car had the green light on Clark street as it crossed the intersection and that the other car driven by Coune crashed through the red light.

After weighing the respective stories the jury could properly conclude that Bergenthal's version of the occurrence was the true one and that plaintiff had failed to prove the charge of negligence against him. This court certainly cannot say that the conclusion in this respect is clearly and manifestly against the weight of the evidence.

Most of plaintiff's argument in this court is concerned with the instructions given. Defendant's instructions Nos. 1 and 7 are criticized because they told the jury in substance that if the evidence was evenly balanced so that the jury was in doubt and unable to say on which side is the preponderance, then the verdict should be not guilty. This instruction has been approved in many decided cases. Chicago Union Traction Co. v. Rae, 218 Ill. 9; Johnson v. Gustafson, 235 Ill. App. 216; Moska v. O'Donnell, 240 Ill. App. 544.

Complaint is made of defendant's given instruction No. 5, in which it is said that the only charge made in the declaration against the defendant Coune was that he was operating his automobile wilfully, wantonly and recklessly. The gist of all three counts of plaintiff's declaration was that Coune was guilty of wilful and wanton operation of his automobile, and plaintiff in his instructions Nos. 2, 3, 4 and 8, given at his request, used the same language.

Defendant's given instruction No. 8 told the jury that if they believed the injury to plaintiff was the result of a mere accident, the verdict should be not guilty as to the defendant Coune. Similar instructions are frequently given in personal injury

and weak traffic; then we saw the whole car going case on killing theory the red light. A number of other witnesses, including the defendant Bergeldsen, testified to the same effect; that Bergeldsen's car had the green light in their direct as it approached the intersection and also had the green as it came by those standing through the red light.

After weighing the respective claims of the jury could properly conclude that Bergeldsen's version of the right was the true one and that plaintiff had failed to prove his claim of negligence against him. This court certainly cannot say that the conclusion in this respect is clearly and manifestly against the weight of the evidence.

Part of plaintiff's argument in this court is directed against the instructions given. Defendant's instructions are, I and V are criticized because they told the jury in substance that if the evidence was evenly balanced so that the jury was in doubt and unable to say on which side is the preponderance, then the verdict should be for plaintiff. This instruction has been approved in many decisions cases. Jackson Union Irrigation Dist. v. Ben, 221 Ill. 7; Johnson v. Chicago, 221 Ill. 491. Cent Ends v. Cheney, 90 Ill. App. 88.

Complaint is made of defendant's first instruction to, 2, in which it is said that the only charge made in the declaration against the defendant alone was that he was operating his automobile wilfully, wantonly and recklessly. The gist of the three counts of plaintiff's declaration was that plaintiff by wilfully and wantonly operating of his automobile, and plaintiff in his instructions Nos. 2, 3, 4 and 5, gives as the reason, same instructions.

Defendant's given instruction No. 2 told the jury that if they believed the injury to plaintiff was the result of a mere accident, the verdict should be not guilty as to the defendant Hansen. Similar instructions are frequently given in personal injury

cases, in very few of which it can be said that the injury was caused by mere accident. While we would not approve of this instruction in every case, we cannot hold that the jury could be misled by it in the instant case.

Defendant's given instruction No. 9 is criticized because it required the plaintiff "to establish" the acts of negligence alleged, citing Murson v. Schmitz, 262 Ill. App. 337, where the use of this word was criticized as placing a higher burden upon the plaintiff than the law required. This was followed by Williamson v. Eaton, 266 Ill. App. 614. The word "establish" might under certain circumstances be considered a little stronger than its synonym, "prove." The dictionaries give the meaning of "establish" - "to prove the truth of" or "cause to be accepted as true." While the use of the word "establish" might in a close case require a reversal, clearly it should not do so in the present case where the clear preponderance of the evidence exonerates the defendant Bergenthal from the negligence charged. It has been held reversible error to refuse instructions which told the jury that the plaintiff was required to "establish" his case. Chicago Union Traction Co. v. Mac, 218 Ill. 9; Chicago Transit Co. v. Campbell, 110 Ill. App. 366. In the recent case of Carl v. Settegast, (Tex. Civ. App.), 211 S. W. 556, the court said that while the expression "establish" has been frequently criticized, yet it meant no more when used in a charge to a jury than the word "prove"; that "The decisions of this state are replete where both expressions have been used synonymously and interchangeably by trial judges in jury trials, and we have no hesitancy in holding that there is really no difference in meaning between the two expressions when so used." Even if the use of the word "establish" was error it was harmless error and would not justify a reversal. Abrahamson v. Blue Motor Coach Lines, No. 36221, opinion filed by this court February 6, 1933. The test of a proper instruction "is

sense, in view of this, it was to hold that the injury was caused by such accident. While we would not quarrel with this instruction in every case, we cannot hold that the jury could be misled by it in the instant case.

Defendant's given instruction no. 3 is objectionable because it required the plaintiff "in establishing the use of negligence alleged" to "satisfy the jury" by the use of "reasonable evidence." See Ill. Ann. Jur. [illegible] the use of this word was criticized as placing a higher burden upon the plaintiff than the law requires. This was followed by Williamson v. [illegible], 288 Ill. App. 614. The word "reasonable" might under certain circumstances be considered a little stronger than its synonym, "proper." The dictionaries give the meaning of "reasonable" - "in proper the exact or" or "means to be accepted as true." While the use of the word "reasonable" might be a close case requiring a reversal, strictly it should not, so in the present case where the clear preponderance of the evidence supports the decision rendered than the negligence charged. It has been most reasonable error to reform instructions which left the jury that the plaintiff was required to "establish" his case. Illinois Valley Building Co. v. Ott, 288 Ill. 5; Illinois Terminal Co. v. Kemmerer, 191 Ill. App. 3d. In the present case of Lutz v. Jackson, [illegible], 111 N. E. 9, the court said that while the expression "reasonable" has been frequently criticized, yet it cannot be held that it is a change in a duty than the word "proper", that "the decisions of this court show the terms both expressions have been used synonymously and interchangeably by trial judges in jury trials, and we find no reason in calling that judge in error in doing so. Effective in creating between the two expressions than as used." From if the use of the word "reasonable" was error it was harmless error and would not justify a reversal. Affirmed. Y. Fine Motor Coach Line, 3d. Ment, opinion filed by this court January 8, 1934. The fact is a proper instruction "in

not what meaning the ingenuity of counsel may attribute to the instruction, but how and in what sense it will be understood by ordinary men acting as jurors, under the evidence before them and the circumstances of the trial." Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207. Furthermore, in a number of other instructions given both at the request of the plaintiff and of the defendant, the jury was repeatedly told that plaintiff was required only to prove his case by the preponderance of the evidence and was not required to prove any fact beyond a reasonable doubt.

Criticism is made of certain other instructions and of the failure to give certain instructions on behalf of the plaintiff, but we find nothing which would justify a reversal. Errors, if any, in this respect were harmless as the jury returned the only verdict that properly could be returned upon the evidence in the case. Ten instructions were given for the plaintiff and twenty-eight for the defendants. While we have frequently criticized giving a large number of instructions, yet the number given in this case is not reversible error.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

not just assuming the integrity of counsel and adhering to the instruction, but now and in what cases it will be undertaken by ordinary men acting as jurors, under the evidence before them and the circumstances of the trial."

Prosecutor, in a number of other instructions given just at the request of the plaintiff and of the defendant, the jury was repeatedly told that plaintiff was required only to prove his case by the preponderance of the evidence and was not required to prove only that beyond a reasonable doubt.

Criticism is made of certain other instructions and of the refusal to give certain instructions on behalf of the plaintiff, but we find nothing which would justify a reversal. Article, if any, in this respect were instructions to the jury requiring the only verdict that properly could be rendered upon the evidence in the case. The instructions were given for the plaintiff and properly-minded for the defendants. While we have frequently criticized giving a large number of instructions, yet the number given in this case is not unreasonable error.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Bakewell, P. J., and O'Connor, J., concur.

36620

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

DANIEL SERRITELLA and HARRY HOCHSTEIN,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

94 17

272 I.A. 616

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants were tried on a charge of conspiracy; the jury found them guilty and each was sentenced to imprisonment of one year in the county jail and to pay a fine of $2000; by this writ of error they seek a reversal.

The indictment, in five counts, charged in substance that defendant Daniel Serritella, who held the office in Chicago of Inspector of Weights and Measures (hereafter called City Sealer) during the four years preceding April 30, 1931, and defendant Harry Hochstein, who held the office of Deputy Inspector of Weights and Measures under Serritella from October 17, 1930, to April 1, 1931, accepted bribes and other rewards from persons, firms and corporations engaged in the business of selling to the people of Chicago, at retail, meats, butter, groceries, vegetables and other food products, and in return therefor permitted or countenanced such retailers to cheat and defraud the buying public by the use of short weights and incorrect scales, resulting in overcharges to customers; that because of this practice the defendants on April 1, 1931, conspired with others unknown to obtain large sums of money by false pretenses from the citizens of Chicago, and had conspired to accept bribes and other rewards, and in return therefor had conspired to refuse and neglect to complain and to begin and prosecute causes of action against said retailers who had violated the ordinances by giving short weights.

Defendants argue that the evidence fails to prove the defendants or either of them guilty.

[illegible]

[illegible]

[illegible]

Defendants in a criminal case must be proven guilty beyond a reasonable doubt, and if the alleged criminal conduct of a defendant can be reasonably explained upon two hypotheses, one consistent with innocence and the other consistent with guilt, the one consistent with innocence must be adopted. People v. Ahrling, 279 Ill. 70; People v. Garbaciak, 306 Ill. 254.

The evidence presents the well known custom of a political leader who, with mixed motives, distributes Christmas baskets of food to the people of his ward or district and solicits to this end contributions from persons with whom he may have official contacts.

The principal witness against the defendants was L. M. Connor, who testified that he was assistant branch manager of the Consumers company, engaged in the business of retailing foodstuffs from various branch stores in Chicago; in the latter part of 1930 he received tickets, issued from the City Sealer's office, alleging that violations in weights had been found in some of these stores, and in response he called at the City Sealer's office, where he saw defendant Hochstein and talked with him about the violations and the tickets; he testified that Hochstein said the Consumers people ought to contribute to Derritella's some Christmas baskets to be given to the poor, to which Connor replied that they were not so situated that they could do this; that thereupon Hochstein said, "Well, you can make it money," and upon inquiring as to how much was wanted Hochstein said, "$200" - and requested that it be brought in currency, not by check; Connor said he would report to his superiors. The witness further stated a promise was made that if the Consumers company would make a contribution it would be unnecessary for him to come to the City Sealer's office on the tickets he had received, and promised to have continued and eventually "fixed" a certain case then pending in court against

the Consumers company. The witness further said that after reporting to his superiors he returned to the City Sealer's office and handed Serritella an envelope containing $200 in currency; that Serritella then thanked him and handed the envelope to Hochstein, and both defendants wished the witness a Merry Christmas and a Happy New Year.

In February or March, 1931, Connor brought several tickets he had received to the City Sealer's office and again saw Hochstein about them, who asked him to make a contribution to the Thompson campaign fund and suggested that $50 would be acceptable; that after reporting to his superiors the witness again saw Hochstein in the City Hall and was taken by him down a pair of stairs into a sort of vault room where Hochstein asked the witness "if he had it" and witness answered in the affirmative and handed Hochstein an envelope containing $50 he had gotten from the cashier at the Consumers Company office; that subsequently he had conversations with Hochstein with regard to tickets that had been served on the stores for claimed violations and that Hochstein said it would not be necessary for the witness to come down town as he would take care of them; that the Consumers company heard nothing further about the tickets. Witness further said he did not give the $200 to the defendants in order to escape a penalty for any wrongdoing; that he was conscious that his store people were not guilty of doing any wrong, and that he believed they had committed no wrong; that he gave the money to escape the annoyance of having so many unjust tickets served on their stores; that Hochstein did not tell him they had to give the money, that he, Connor, regarded it as a request. Witness further said that he thought his company had sometimes given Christmas baskets.

Evidence was introduced of the procedure in the City Sealer's office in ascertaining violations. The usual practice

the Commonwealth economy. The witness further said that after repayment to him expenses be returned to the City Sealer's office and handed Gertrella an envelope containing £20 in currency; that Gertrella then thanked him and handed the envelope to Lockwood, and both defendants signed the witness's entry docket and a Sandy Lane.

In February or March, 1933, Gordon brought several tickets he had received to the City Sealer's office and again met Lockwood there, who asked him to make a contribution to the Thompson campaign fund and suggested that £20 would be acceptable; that after reporting to his superiors the witness again met Lockwood in the City Hall and was taken by him into a suite of offices into a room of which there were Gertrella and the witness "if he had it" and witness answered in the affirmative and handed Lockwood an envelope containing £20 on the ground that the payment of the Commonwealth Crown office; that subsequently he had conversations with Lockwood with regard to tickets that was owing on the stores for Sydney stockyards and that Gertrella said it would not be necessary for the witness to come down again as he would take care of them; that the Commonwealth Crown board building further about the tickets. Witness further said he did not give the £20 to the defendants in order to secure a monopoly for his wrongdoing; that he was assuming that all other people were not paying of doing any wrong, and that he believed they had committed no wrong; that he gave the money to secure the employment of having no many unpaid tickets passed on their stores; that Lockwood did not tell him they had to give the money, that he, Gordon, regarded it as a payment. Witness further said that he thought his company had sufficient plant and machinery.

Evidence was introduced of the procedure in the City Sealer's office in issuing tickets. The usual practice

is for deputies to go into their several districts and make purchases from stores; articles purchased are weighed and then the deputies identify themselves and examine the scale to see if it is correct; if the scale is not found to be correct the deputies fill out a form notifying the dealer of the violation of the city ordinance; usually for the first violations warnings are given and records made on a card system; when there are repeated violations the matter is brought to the attention of the city prosecutor.

City ordinances were introduced in evidence, making it the duty of the Inspector of Weights and Measures to examine once a year all scales and to report to the prosecuting attorney the names and places of any persons violating any provision of the ordinances by fraudulent or short weights. There was also a provision for punishing any person having instruments for weighing which are out of order or incorrect.

William Klein, qualified as an expert on scales, testified as to the manner in which such scales were tested from time to time; he said that in time the pinions and racks in scales become worn by vibration which affects the accuracy of the scale, and that sometimes neglect to oil them and the presence of dirt hinders the action of the scale; that sometimes a dealer is busy and does not give the scale sufficient time to rest and the customer is sometimes charged too much and sometimes too little for what he gets. The State put on twelve witnesses who were employed as investigators by what is termed the "secret six;" they were instructed to make investigations of short weights by dealers in foodstuffs and particularly meat markets, and were so employed for about twenty days commencing March 10, 1931; most of these investigators were women. Two women would call at a store, ask the price per pound of an article, the clerk would then weigh it, stating the total price; the investigators would then pay the price and the women

in for despatch to go into small several districts and make purchases from stores; articles purchased are weighed and then the dependent identify themselves and examine the scale to see if it is correct; if the scale is not found to be correct the dependent fill out a form notifying the dealer of the violation of the city ordinance; usually for the first violations warnings are given and records made on a card system; when there are repeated violations the matter is brought to the attention of the city prosecutor.

City officials were interested in welfare, making it the duty of the Department of Public Welfare to examine once a year all scales and to report to the prosecuting attorney the names and places of any persons violating any provision of the ordinance by frauds or short weights. There was also a provision for punishing any person having instruments for weighing which are out of order or inaccurate.

William Klein, qualified as an expert on scales, testified as to the ease in which such scales were broken from time to time; he said that in time the springs and rods in scales became worn by vibration which affects the accuracy of the scale, and that sometimes neglect to oil them and the presence of dirt hinders the action of the scale; that sometimes a dealer is busy and does not give the scale sufficient time to rest and the customer is sometimes charged too much and sometimes too little for what he gets. The State did not in twelve visitations find any violations in Indianapolis by what is termed the "cheaper class" that were instituted to make investigations of short weights by dealers in foodstuffs and particularly meat markets, and were so analyzed for about twenty days commencing March 16, 1921; most of these investigators were women. The women would call at a store, see the price per pound of an article, the clerk would then weigh it, stating the total price; the investigators would then pay the price and the woman

would take it from the store; they would attach to the article a report blank stating the name of the store, the location, a description of the clerk who made the sale, the name of the scale used and the name of the article purchased, with the price per pound quoted and the total amount paid; none of the investigators knew what the article weighed; they did not look at the scales; they would report to a Mr. Ackerman and the articles purchased would be weighed by him and they would then insert in their report blank the weight as given by him; the purchases were principally meats; the investigators made approximately 2500 purchases which were weighed and reported as described, and at least 100 stores were investigated. A chart was introduced in evidence on behalf of the State showing approximately 250 of these purchases made from three houses only - General Market House, Feilchenfeld Bros., and Novak's Stock Yards Market. Edward Wright testified that as an employee of the "Secret Six" he instructed the investigators as to their duties, and that whatever the women investigators wrote in their report depended upon their honesty and integrity.

A manager of a scale company testified that the computation of scales varies between one and two cents as to accuracy. George Ackerman testified that he weighed the purchases made by the investigators upon accurate scales; that approximately 2500 purchases were made by the investigators, but he did not know what proportion was found to be correct as compared with those found to be incorrect; the witness recalled that in some purchases there was an overweight and the money paid was less than the amount that should have been paid.

Defendants moved to strike out all the testimony concerning the purchases made by these investigators, which motion was denied. We hold that this ruling was proper. A conspiracy may be established by proof of circumstances from which a jury may infer its existence.

would have in form the above; they would attach to the article a report blank stating the name of the store, the location, a description of the clerk who made the sale, the name of the scale used and the name of the article purchased, with the price per pound (noted and the total amount paid; none of the investigators knew what the article weighed; they did not look at the scales; they would report to a Mr. Ackerman and the article purchased would be weighed by him and they would then insert in their report blank the weight as given by him; the purchases were principally meats; the investigators made approximately 750 purchases which were weighed and reported as described, and at least 300 stores were investigated. A chart was introduced in evidence on behalf of the State showing approximately 350 of these purchases made from stores located only - General Market House, Williamsville Inn., and Kevin's Corner Tavern matter. Edward Wolfe testified that as an employee of the "Secret Service" he instructed the investigators as to their duties, and that moreover the women investigators made in their reports depended upon their honesty and integrity.

A manager of a scale company testified that the computation of scales varies between one and two cents as to accuracy. George Ackerman testified that he weighed the purchases made by the investigators upon correct scales; that approximately 400 purchases were made by the investigators, but he did not know what proportion was found to be correct as compared with those found to be incorrect; the witness testified that in some purchases there was an overweight and the money paid was less than the amount that should have been paid.

Defendants moved to strike out all the testimony concerning the purchases made by these investigators, which motion was denied. We hold that this ruling was proper. A conspiracy may be established by proof of circumstances from which a jury may infer its existence.

Tedford v. The People, 219 Ill. 23. And it is permitted to show any facts and circumstances from which the jury might infer a common design to act together in pursuance of a common criminal purpose. The People v. Rushbaum, 328 Ill. 518. Whatever tends to show the carrying out of the conspiracy is relevant to the issue and is admissible. The People v. Looney, 324 Ill. 375. The record of inaccuracies found by the investigators was material and relevant as touching the charge that defendants had permitted violations of the city ordinance with respect to weights. However little it might tend to prove the crime charged, its weight was for the jury to determine and it was admissible.

On behalf of the defendants thirteen deputy inspectors employed in the office of the City Sealer during the time the defendants were in office gave testimony; all of them stated that they were employed in checking violations in grocery stores, meat markets and other places, and that at no time were they ever asked by either of the defendants to oppress or harass anybody, or to favor anybody, or to differentiate between any of the stores, or to refrain from prosecuting anybody or refrain from visiting any places, or to do any wrong whatever. Some of these witnesses were civil service employees and had been employed in the City Sealer's office for more than twenty years, and at the time of the trial were still in that office under Joseph Grain, Serritella's successor.

Nineteen witnesses on behalf of the defendants testified that they were precinct captains in various precincts in the first ward, of which Serritella was a committeeman; that for a day or two before Christmas, 1930, they packed about 1500 baskets with food, which were given to poor people in the ward; that no distinctions were made as to the recipients and that the baskets were distributed without regard to race, color or creed, either political or religious

Dalfort v. The Family, 300 Ill. 24, and it is permitted to show such facts and circumstances from which the jury might infer a conspiracy to act together in pursuance of a common criminal purpose. The People v. Gardner, 280 Ill. 414. Whether tends to show the conspiracy and of the participation in relation to the issue and be admissible. The People v. Lemon, 224 Ill. 172. The present of incriminating facts by the investigation was material and relevant as tending the charge that defendants had published statements of the city ordinance with respect to voting. However liable it might have to have the same charge, its validity was for the jury to determine and if was admissible.

On behalf of the defendants thirteen digit investigators employed in the office of the City Sealer during the time the defendants were in office gave testimony; all of them stated that they were employed in assisting relatives in minority wards, some outside and other places, and that at no time were they over ruled by either of the defendants in matters or business affairs, nor in fact anybody, or in differentiate between any of the states, or in refusal from prosecuting anybody or refusal from visiting any places, or in, any other relatives. Some of these witnesses were public service employees and had been employed in the city sealer's office for more than twenty years, but on the close of the trial were still in that office under French grade, Superintendent's report.

Thirteen witnesses on behalf of the defendants testified that they were crowded respiring in various precincts in the first ward, of which Martinsville was a constituent; that for a day in the before Martinsville, 1910, they passed among and shaking with that, which were given to poor people in the ward; that no distinction was made as to the residents and that the tickets were distributed without regard to race, color or creed, either political or religion

The pastors of several church parishes testified that they received some of these baskets for their parishioners. A witness testified that defendant Serritella gave him the money to buy the baskets before they were filled.

Twelve merchants engaged in the produce business testified that they made donations of foodstuffs to Serritella's Christmas basket fund; nearly all of them had been solicited by James Lenguadoro, an officer of the Commission Drivers' Union and not connected with the City Sealer's office. Lenguadoro testified that he solicited from different firms for Serritella's Christmas basket fund, collecting about three truck loads; that the day before Christmas Serritella told the witness that they were short three or four hundred baskets and instructed witness to buy some foodstuffs and that he, Serritella, would pay for them; that witness did so and expended about $245 in making these purchases and was thereafter reimbursed by Serritella.

The general manager of the Novak's Stock Yards Market testified that he contributed hams and never had any agreement with defendants whereby the Novak stores were to be favored in the matter of investigation of scales and never received any word from them that they were to be permitted to make overcharges or give short weights; that the employees of the Novak stores were never instructed that they would be permitted to make overcharges or give short weights, - they were instructed to give full weight; that they have a man employed who makes periodical inspection of their scales and cleans,oils and adjusts them; that they have twenty-one stores in Chicago and this man makes the rounds about once a month; that it was the practice of his stores to make other donations, such as to the American Legion, the Volunteer Rescue Army, political organizations and to persons running for office.

Mr. Feilchenfeld of the firm of Feilchenfeld Bros., denied

that any wagons or trucks belonging to this concern delivered any meats for the Christmas fund and denied that he had ever made any donation to the City Sealer's office at any place or at any time. Other witnesses had testified that they saw Feilchenfeld Brothers' trucks delivering goods for the Christmas baskets. The witness said he had a number of cases brought against him for short weight violations during the administration of Serritella; that the witness would explain the violation and was told by Serritella that if it was the first time the matter would be dropped, but that witness must caution his people; that on one occasion Serritella prosecuted his concern; witness made all his employees when taken into employment make affidavits that they would give the people sixteen ounces to the pound and placards were posted in his markets requesting the public to report any violations with respect to weights.

Serritella testified that he was State senator from the First District of Illinois and was Republican ward committeeman for the first ward; that he was appointed City Sealer in 1927 for a period of four years; that Rechstein became his chief deputy October 17, 1930; that he gave about 1500 baskets of food at Christmas in 1930 to the poor people of his ward, which he distributed through the various precinct captains; that he did not receive any merchandise from Feilchenfeld Bros.; he confirmed the visit of Mr. Connor of Consumers company to his office with the envelope containing the money which the witness gave to Rechstein, and said that he had no other conversation with Connor; that the money received from Connor was used with some of his own to reimburse Languadoro for the purchases made by him; that he gave $200 to the president of the Meat Cutters' Union for the purchases, and also $100 with which to purchase baskets, and also other amounts which he became obligated to pay, and that all of the moneys expended in conducting the Christmas

basket affair were his own funds except the $200 he received from Conner; that the $50 which Conner gave for the campaign of William Hale Thompson was given by Rochstein to the witness and turned over with other contributions to this fund to the secretary of the Thompson campaign; the witness said that he at no time agreed with any stores to have them violate any ordinance and never showed any partiality, one over another; that the custom in his office with reference to first violators was to give them a warning, and that during the time he was in office he never received any money from anybody as a bonus or bribe; that outside of this Christmas basket affair, none of the markets or stores had ever given him anything.

Defendant Rochstein denied that he ever told Conner that he would take care of violation tickets if he would make a donation to the Christmas basket fund or contribute to the Thompson campaign fund, and in general denied any agreement with Conner to permit the violation of the city ordinance.

Summarized, the State's case is that the donations solicited and received by defendants were in the nature of bribes, in consideration of which the donors would be permitted to violate the ordinance relating to weights and scales. Defendants present Conner's denial that his company consciously did any wrong, and there is no evidence to the contrary; Feilchenfeld says he contributed nothing to the Christmas baskets; Serritella confirms this; Feilchenfeld and other merchants denied any intentional violations and told of their precautions to prevent short weights; many merchants testified that it had been their habit for years to contribute to a variety of organizations at Christmas and other times; some of them knew neither of the defendants. The records of the investigators of the "Secret Six" show, if accurate, that in the entire number of purchases made there were short weights in about ten per cent, but these might have occurred through defective scales or

carelessness of the clerks; there is no evidence that they occurred intentionally or pursuant to any orders from the employers. The evidence failed to establish the guilt of the defendants beyond a reasonable doubt.

Where a reviewing court is of the opinion that the conviction is based upon unsatisfactory evidence, which fails to prove the guilt of the defendant beyond all reasonable doubt, it is the duty of the reviewing court to reverse the judgment. The People v. Elmore, 318 Ill. 276; The People v. Rice, 323 Ill. 340; The People v. Ressler, 333 Ill. 451; The People v. Glasser, 355 Ill. 263; The People v. Vehon, 340 Ill. 511.

It is a common occurrence in this community for persons of all sorts to promote in the name of charity picnics, balls, card parties, distribution of Christmas baskets, and like affairs, and to solicit, more or less pointedly, contributions from those who are thought to be vulnerable to such requests. The donors may feel subjected to a kind of immoral coercion, but neither such soliciting nor responding is as yet a crime.

Complaint is made of the cross examination by the assistant State's attorney of the witness Serritella, which consisted almost entirely of questions concerning matters which had occurred before the grand jury. It would require too much space to set these forth. We agree with the criticisms of defendants' counsel that these questions touched matters entirely immaterial to any issue in the case and that the questions were highly prejudicial.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

36812

BERNARD R. ROSENBERG,
Appellee,

vs.

SAM KANTOROWITZ,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

272 I.A. 616[2]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an action in trover tried by the court, in which judgment was against the defendant for $317.25, from which he appeals.

Counsel for defendant in writing his brief has not followed Rule 19 of this court and has also erroneously entitled the case both in his briefs and his abstract. The case should be entitled in this court as it was in the trial court.

The conflict is between plaintiff, a mortgagee under a chattel mortgage, and defendant, the landlord of the mortgagor.

Plaintiff testified that on October 15, 1931, J. B. Wolff, a relative, was indebted to him in the sum of $750 and on that date gave his note in this sum, payable ninety days thereafter, secured by a chattel mortgage conveying certain chattels on the premises at 2821 West Madison street, Chicago, where Wolff occupied a store leased from defendant and was engaged in the tire and vulcanizing business; the chattel mortgage was duly recorded; it contained the usual provision that upon default the mortgagee should have the right to take immediate possession of the chattels conveyed. When the note fell due, January 15,1932, Wolff failed to pay it but plaintiff allowed the chattels to remain in the possession of Wolff in his store.

On June 6, 1932, some items of personal property in the store were sold to defendant for $25 by a deputy-bailiff of the Municipal court by virtue of a judgment obtained by The Beckley-

Ralston Company against Wolff; plaintiff notified all parties present at the sale that he held a chattel mortgage on all the chattels in the store; after the sale defendant refused to allow Wolff to enter the store and refused to deliver any chattels to plaintiff or Wolff. Plaintiff's theory is that the chattels sold by the deputy-bailiff were not chattels mentioned in his chattel mortgage, and that the mortgaged chattels were retained by defendant, who had no right or interest in them. This is the crux of the case.

Wolff testified that he was present at the time of the sale and that the chattels mentioned in the mortgage were not sold under the levy. The deputy-bailiff who conducted the sale said that he did not look behind the counters or in boxes or in the basement of the store at the time of making the sale. Defendant admitted that after the sale he went into the basement and found various chattels which he described as junk of no value. Comparing the itemized list of the chattels sold at the time of the levy with the itemized list appearing in the chattel mortgage, it will be seen that the items sold at the sale are not described in the chattel mortgage. Plaintiff made a demand both on Wolff and on defendant for all the goods covered by the chattel mortgage and that were not sold in the levy and was told by defendant to "Go to hell." After the sale the defendant changed the lock on the door of the store and refused to admit Wolff or to allow any chattels to be removed. Wolff said that while he did remove certain items such as tires from the store prior to the levy, he was certain that the chattels described in the mortgage and which are sought to be recovered in this suit still remained in the store.

Although there may be some doubt as to all the facts, yet upon the record made the court could properly find that the items sold to defendant under the levy were not mentioned in the plaintiff's chattel mortgage; that these items were retained by the

Claims Company against Wolff; plaintiff modified his previous presents in his role into a joint a chattel mortgage on all the articles in the store; after the male defendant refused to allow Wolff to enter the store and refused to deliver any chattels to plaintiff or Wolff. Plaintiff's theory is that the chattels sold by the County-Dealer were not chattels mentioned in his chattel mortgage, and that the mortgaged chattels were replaced by defendant, who had no right or interest in them. This is the crux of the case.

Wolff testified that he was present at the time of the sale and that the chattels mentioned in the mortgage were not sold under the levy. The County-Dealer who conducted the sale said that he did not look behind the counters or in boxes or in the basement of the store at the time of making the sale. Defendant admitted that after the sale he went into the basement and found various chattels which he described as junk of no value. Comparing the itemized list of the chattels sold at the time of the levy with the itemized list appearing in the chattel mortgage, it will be seen that the items sold at the sale are not described in the chattel mortgage. Plaintiff made a demand into on Wolff and on defendant for all the goods covered by the chattel mortgage and that were not sold in the levy and was told by defendant to "go to hell." After the sale the defendant changed the locks on the door of the store and refused to admit Wolff or to allow any chattels to be removed. Wolff said that while he did remove certain items such as tires from the store prior to the levy, he was certain that the chattels described in the mortgage and which are sought to be recovered in this suit still remained in the store.

Although there may be some doubt as to all the facts, yet upon the record made one must admit property like that the same sold to defendant under the levy was not mentioned in the plaintiff's chattel mortgage; that these items were retained by the

defendant who was not a judgment creditor nor lien claimant, and so far as the record shows, had no right or interest in them, and although demands were made upon him, refused to deliver possession to the plaintiff.

It is said that the lien of the mortgage has expired because the plaintiff allowed possession of the chattels to remain in the mortgagor, Wolff, almost six months after the default in payment of the note. This would be true if the rights of third parties intervened, but the mortgage is still valid as between the mortgagee and the mortgagor. The defendant here had no claim whatsoever against the chattels, either as a creditor, incumbrancer or purchaser. The record does not disclose that he had any claim for rent against Wolff or that he had distrained on the property.

Reversible error is claimed in the admission by the court of a carbon copy of a letter purporting to have been sent by plaintiff to defendant June 8, 1932, which was after the sale, in which letter plaintiff again demanded return of the property and threatened legal proceedings if the same were not returned. Defendant made only a general objection to the carbon copy. It has been held that such an objection raises only the question of relevancy. Scott v. Caldwell et al., 152 Ill. App. 172; Wabash R. R. Co. v. Johnson, 114 Ill. App. 545. Furthermore, the original letter seems to have been sent by mail, by registered letter, and defendant duly receipted for same.

The assertion that there was no conversion on June 6, the date of the sale, is unfounded. There was direct, uncontradicted evidence that on that date plaintiff demanded return of the chattels not sold; that defendant abruptly refused to surrender them and barred admission of Wolff to the store, refusing to permit him to remove the chattels not sold.

There was sufficient evidence as to the value of the chattels. Wolff, who testified as to the values, recalled the prices paid by

defendant who was not a judgment creditor nor like claimant, and so far as the record shows, had no rights or interest in them, and although demands were made upon him, refused to deliver possession to the plaintiff.

It is said that the time of the mortgage was extended because the plaintiff allowed possession of the materials to remain in the mortgagor, Hilt, almost all weeks after the maturity is original of the note. This would be true if the rights of third parties intervened, but the mortgage is still valid as between the mortgagee and the mortgagor. The defendant here has no claim whatsoever against the materials, either as a creditor, incumbrancer or purchaser. The record does not disclose that he had any claim for work against Hilt or that he had distributed on the property.

Reversible error is claimed in the admission by the court of a carbon copy of a letter purporting to have been sent by plaintiff to defendant June 2, 1921, which was after the date, in which latter plaintiff again demanded return of the property and threatened legal proceedings if the same were not returned. Defendant made only a general objection to the carbon copy. It has been held that such an objection raises only the question of relevancy. Davis v. Chicago et al., 124 Ill. App. 474; Tobey v. [illegible] 114 Ill. App. 318. Furthermore, the original letter seems to have been sent by mail, by registered letter, and defendant duly responded for some.

The assertion that there was no conversion on June 8, the date of the suit, is unfounded. There was direct, uncontradicted evidence that on that date plaintiff demanded return of the chattels and said; that defendant promptly refused to surrender them and hurled admission of title in the store, refusing to permit him to remove the chattels not said.

There was sufficient evidence as to the value of the chattels. Hilt, who testified as to the value, received the prices paid by

him when the items were purchased, and had bought and sold the same type of merchandise for a period of seven years. Only a general objection was made to his testimony and the record shows no contradictory evidence as to the value of the property.

Counsel for defendant earnestly argues that the conduct of the trial Judge was a violation and denial of due process of law guaranteed by the Constitution. The bill of exceptions shows that the cause came on for trial March 23, 1933; that plaintiff's witnesses testified and then defendant called three witnesses, all of whom testified; the bill of exceptions then recites: "The court having heard all the evidence submitted and arguments of counsel," suggested that plaintiff file an amended statement of claim, dismissing as to Wolff, who in the first instance had been a co-defendant with Kantorowitz. The court stated in substance that the cause was continued until the following day at twelve o'clock for the purpose only of permitting such an amendment. No objection was made by counsel for defendant to this. When the parties met the following day counsel for defendant attempted to address the court but was prevented; counsel stated that he wished to make an objection to the statement of claim; the court then read the amended statement of claim and held that it was proper and in accordance with the evidence; there were other remarks by defendant's counsel but the brief fails to show just what material matter counsel wished to present; something is said to the effect that no affidavit of merits was filed to the amended statement of claim, but the record shows that the defendant's original affidavit of merits was ordered to stand to plaintiff's amended statement of claim. We do not discern any matter of substance appearing on this occasion which would demand a reversal.

Some suggestion is made that the air compressor mentioned in the chattel mortgage was not on the premises at the time of the

his case. The times were pandemonic, and had begun not with the same type of mortgaging for a period of years. Only a general objection was made to his testimony and the record shows no contradictory evidence as to the value of the property.

Counsel for defendant earnestly argues that the decree of the Circuit Judge was a mistake and doubt as to the presence of the guaranteed by the guarantorship. The bill of exceptions shows that the cause came on for trial March 12, 1920; that plaintiff's witnesses testified and then defendant called three witnesses, all of whom testified; the bill of exceptions then recites: "The court having heard all the evidence introduced and objections of counsel," suggested that plaintiff file an amended statement of claim, disclosing as to Wolf, who in the first instance had been a co-defendant with Kaufmanville. The court stated in substance that the cause was continued until the following day at twelve o'clock for the purpose only of permitting such an amendment. No objection was made by counsel for defendant to this. When the parties met the following day counsel for defendant attempted to address the court but was prevented; counsel stated that he wished to make an objection to the statement of claim; the court then read the amended statement of claim and held that it was proper and in accordance with the evidence; there was other evidence by defendant's counsel but the brief fails to show that material matter contained wished to present; something is said to the effect that no affidavit of merits was filed to the amended statement of claim, but the record shows that the defendant's original affidavit of merits was offered to stand to plaintiff's amended statement of claim. We do not discuss any matter of substance appearing on this occasion which would demand a reversal.

Some suggestion is made that the air compressor mentioned in the chattel mortgage was not on the premises at the time of the

sale . There is some uncertainty in the testimony of the witness Wolff in this respect, but in listing the items on the premises not included in plaintiff's sale, he mentioned the air compressor and repeated that these items still remained in the store. The bill of exceptions is in narrative form and if there is any ambiguity with respect to this item it must be construed against defendant, who prepared the bill of exceptions. Johnson v. Johnson, 187 Ill. 86; Redfern v. McNaul, 179 Ill. 203; Seehausen Wehrs & Co. v. Interstate S. & I. Co., 150 Ill. App. 179.

We cannot say that the conclusion of the trial court was manifestly against the weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

main. There is some uncertainty in the testimony of the village Waiti in this respect, but it leaves the issue on the previous map indicated is plainly a mere, as evidenced the air surveyed and repeated that these lines still remained in the state. The bill of complaint is in material form and it shows in any multiply with respect to this line it must be continued against defendants, who resented the bill of complaint. Hammond v. Thomas, 147 Ill. 80; Tulleys v. Kelsey, 119 Ill. 443; Gardner Town & Co. v. Interstate R. A. C. Co., 190 Ill. App. 171.

It cannot be that the resolution of the tribal court was conclusively against the rights of the relatives, and our inquiry is therefore affirmed.

AFFIRMED.

BARNHART, J., and O'Connor, J., concur.

36830

ELIZABETH BROWN COWELL,
Appellant,

vs.

GEORGE E. CORBETT, Jr.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

272 I.A. 616[3]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for rent and upon trial by the court suffered an adverse judgment from which she appeals. Defendant was a lessee under a written lease of certain premises at a rental of $85 a month, for a term beginning October 1, 1931, and expiring September 30, 1934. Plaintiff's claim was for rental of November and December, 1932, and January, 1933, at the rate of $85 a month, making a total claim of $255. Defendant does not appear in this court.

The only evidence offered was that on behalf of plaintiff, which was presented by her attorney, Mr. Leslie H. Whipp, who offered the lease in evidence and testified as to the amounts due for the months in question. He also testified as to a conversation with defendant in which defendant had promised to pay the rental due. Defendant's attorney objected to Mr. Whipp testifying on the ground that he was the attorney for the plaintiff; the court thereupon found for defendant, stating in substance that he did so on the ground that the testimony of the attorney for plaintiff was not admissible.

"The propriety of attorneys testifying in cases in which they are interested has been criticized by this court, but the objection goes only to the credibility of the testimony and not as to its admissibility." Bogart v. Brazee, 331 Ill. 160; Barto v. Kellogg, 289 Ill. 528; Wright v. Buchanan, 287 Ill. 468; Landes v. Landes, 268 Ill. 11; Wetzel v. Firebaugh, 251 Ill. 190; Hunter v.

[illegible]

[illegible] MUNICIPAL COURT,

Appellant,

vs.

[illegible] E. CONNELLY, JR.,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 616

[illegible]

PLAINTIFF brought suit [illegible] by the [illegible] [illegible] defendant [illegible]. Defendant was a lessee under a written lease of certain premises at a rental of $[illegible] a month, for a term beginning October 1, 1933, and ending September 30, 1934. Plaintiff's claim was for rental of November and December, 1933, and January, 1934, at the rate of [illegible] a month, making a total claim of $[illegible]. Defendant does not appear in this court.

The only evidence offered was that on behalf of plaintiff, which was presented by her attorney, Mr. Louis E. Ehlop, who offered the lease in evidence and testified as to the amounts due for the months in question. He also testified as to a conversation with defendant in which defendant had promised to pay the rental due. Defendant's attorney objected to Mr. Ehlop testifying on the ground that he was the attorney for the plaintiff; the court thereupon found for defendant, stating, in substance that if it do on the ground that the testimony of the attorney for plaintiff was not admissible.

"The propriety of attorneys testifying in cases in which they are interested has been criticized by this court, but the objection goes only to the credibility of the testimony and not as to its admissibility." Ducey v. Brown, 221 Ill. 240; Burke v. Dalton, 238 Ill. 388; Tuohy v. Dahlman, 247 Ill. 464; Fowler v. Lawler, 252 Ill. 13; Dunne v. Tiffenhour, 252 Ill. 190; Dunne v.

Empire State Surety Co., 191 Ill. App. 634.

Virtually Mr. Whipp was testifying only as to the amount unpaid and was in effect corroborating the obligations undertaken by defendant in the lease.

We do not agree with the trial Court as to the inadmissibility of the testimony on behalf of plaintiff, and the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

Smith v. Texas Company, 131 III. App. 644.

Finally in, Tiffany has textilized only in the second appeal but was in effect introducing the affirmative materials by defendant in his house.

To do not agree with the trial court in it the conclusion sitting at the continuity in behalf of plaintiff, and the judgment will be reversed and the cause remanded.

Stephens, v. C., and Stephens, J., concur.

36894

JOSEPH SHEDBAR,
Appellee,

vs.

THE STOCK YARDS TRUST & SAVINGS BANK, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 616

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover $700 paid by him to defendant as earnest money on a proposed contract of sale of certain real estate, which sale was never consummated; upon trial by the court the finding was favorable to plaintiff and judgment was entered against defendant, from which it appeals.

Plaintiff gave defendant $700, receiving a receipt which recited that it was a deposit of earnest money in connection with the purchase of certain premises, and that a contract would be prepared for the sale of this property at the price of $8,000 cash; plaintiff says that subsequently he was presented by defendant with what purported to be the contract of sale, and that plaintiff signed the same; that it developed that this was not a contract of sale as contemplated by the receipt given to plaintiff when he paid $700 as earnest money. Hence, plaintiff claims, defendant defaulted on its part of the agreement and that he is entitled to the return of the deposit.

Defendant argues that the receipt and the contract subsequently signed are both part of the same and one transaction and should therefore be considered as one instrument, citing a number of cases stating the general rule to this effect.

Plaintiff is an elderly person, evidently somewhat ignorant, born in Lithuania, he does not know exactly where; he works as a janitor. He saw a sign on some property on Aberdeen street indicating that it was for sale by defendant; he called at the bank and talked to Mr. Porter about buying the property. Porter first said

that he wanted $8500 for it but finally agreed to reduce the price to $8000, and plaintiff says that Porter agreed to make a mortgage on the property for $7000; that he told plaintiff to bring seven or eight hundred dollars as deposit money. March 4, 1931, plaintiff deposited $700 with Mr. Porter and received a receipt written on the letterhead of the defendant bank, which reads as follows:

"Mr. Joseph Shedbar:

This will acknowledge receipt of cashier's check of Central Manufacturing District Bank for $700.00, being a deposit of earnest money by you in connection with the purchase of the premises known as 3427-29 Auburn Avenue, and 848 West 34th Place.

It is understood that a contract will be prepared at once covering the sale of this property providing for a sales price of $8000.00 cash upon our furnishing evidence to you of title to the premises free and clear of all incumbrances and objections, and subject only to the taxes for the years subsequent to the year 1928.

It is also understood that the contract will provide for our allowing you the amount of the 1929 and 1930 taxes in full and for the 1931 taxes pro-rated to the date of closing.

Very truly yours,

(Signed) J. G. Porter,

JGP:PJ Trust Officer."

It is conceded that J. G. Porter was the trust officer of the defendant bank and executed the receipt on its behalf. Mr. Porter told plaintiff to call the next day and they would give him a contract of purchase, and on the following day defendant presented to plaintiff an agreement dated March 5, 1931, which reads as follows:

"Agreement.

This Agreement made and entered into this 5th day of March, A. D. 1931 by and between The Stock Yards Trust and Savings Bank, as Guardian of the Estate of William Coolahan, a minor, party of the first part and Joseph Shedbar of the City of Chicago, County of Cook and State of Illinois, party of the second part, witnesseth:

Whereas, William Coolahan, a Minor, and Boles P. Gronsky, are each the owners of an undivided one-half interest in the following described premises, to-wit: (Then follows a legal description of the property) -and

Whereas, certain proceedings for the partition of said premises are now pending in the Circuit Court of Cook County entitled Boleslaw Gronsky vs. William Coolahan, Jr., No.B-205512, and

Whereas, party of the first part is now opposing the partition of said premises in said proceedings and is unwilling to incur the expense of such proceedings or to permit said property to be sold at public sale, unless it be assured that a fair price will be obtained at said sale.

Now, Therefore, for and in consideration of the premises and

that he wanted $8000 for it but finally agreed to reduce the price to $6500, and plaintiff says that Porter agreed to make a mortgage on the property for $3500; that he told plaintiff to bring seven or eight hundred dollars as earnest money. March 4, 1931, plaintiff deposited $700 with Mr. Porter and received a receipt written on the letterhead of the defendant bank, which reads as follows:

"Mr. Joseph Sneider:
This will acknowledge receipt of cashier's check of Central Manufacturing District Bank for $700.00, being a deposit of earnest money by you in connection with the purchase of the premises known as 5457-59 Auburn Avenue, and 946 West 54th Place.
It is understood that a contract will be executed at once covering the sale of this property providing for a sales price of $6500.00 upon our furnishing evidence to you of title to the premises free and clear of all incumbrances and objections, and subject only to the taxes for the years subsequent to the year 1928.
It is also understood that the contract will provide for our allowing you the amount of the 1929 and 1930 taxes in full and for the 1931 taxes pro-rated to the date of closing.
Very truly yours,
(Signed) J. G. Porter,
JGP:DT Trust Officer."

It is conceded that J. G. Porter was the trust officer of the defendant bank and executed the receipt on its behalf. Mr. Porter told plaintiff to call the next day and they would give him a contract of purchase, and on the following day defendant presented to plaintiff an agreement dated March 5, 1931, which reads as follows:

"Agreement.
This Agreement made and entered into this 5th day of March, A. D. 1931 by and between the Stock Yards Trust and Savings Bank, as Guardian of the Estate of William Goelzman, a minor, party of the first part and Joseph Sneider of the City of Chicago, County of Cook and State of Illinois, party of the second part, Witnesseth:
Whereas, William Goelzman, a minor, and Helen B. Greenery, are each the owners of an undivided one-half interest in the following described premises, to-wit: (Then follows a legal description of the property) —and
Whereas, certain proceedings for the partition of said premises are now pending in the Circuit court of Cook County entitled Helen B. Greenery vs. William Goelzman, Jr., No. B-203912, and
Whereas, party of the first part is now opposing the partition of said premises in said proceedings and is unwilling to incur the expense of such proceedings or to permit said property to be sold at public sale, unless it be assured that a fair price will be obtained at said sale.
Now, Therefore, for and in consideration of the premises and

in order to induce said party of the first part to withdraw its opposition to the partition of said premises, to facilitate the procuring of a proper decree of said Circuit Court of Cook County in said partition proceedings or any other partition proceedings said party of the second part agrees to bid for and to pay for said premises at such sale the sum of Eight Thousand Dollars ($8,000.00) in cash when said sale has been approved by the Circuit Court of Cook County or other court of general jurisdiction in Cook County, Illinois, and when a deed conveying good title to the said premises subject to taxes and special assessments is ready for delivery.

Dated at Chicago, Illinois, the day in the year first above written.

The Stock Yards Trust and Savings Bank,
as Guardian of the Estate of William
Coolahan, a Minor.
By Joseph G. Porter,
Trust Officer.

Joseph Shedbar (Seal) "

Plaintiff was not at this time represented by any attorney and the evidence tends to show that he seemed to think that the property then belonged to him for he did some work in repairing and painting it, but was told by someone to stop the repair work as he, plaintiff, had "no papers;" plaintiff inquired of Mr. Porter about "the papers" and apparently was told that the bank could not make a mortgage for the reason that people were taking their money out and the bank could not give any money. Plaintiff says he talked to Mr. Porter about fifteen times and was told that the bank could do nothing and was advised to look for another bank from which he might get a mortgage. Mr. Porter declined to return the earnest money deposited by plaintiff.

Plaintiff rests his case upon the point that, while defendant by its receipt undertook to prepare a contract of sale of the real estate at a price of $8000, it did not do so, but in fact provided a contract by which it sought to bind plaintiff to agree to bid this amount at a partition sale of the property. We think the point is well taken. The cases cited by defendant to the effect that two written instruments executed concerning one transaction must be considered as one instrument do not apply to the instant case. A typical case, cited by defendant, is Illinois Match Co. v. C.R.I.& P. Ry. Co., 250 Ill. 396, where a shipping order was delivered by

plaintiff to defendant and a bill of lading delivered by defendant to plaintiff. It was held that this constituted one contract for the carriage of the commodity. In the instant case it is apparent that plaintiff was contracting only with reference to the purchase of the property and the receipt which he received is clear on this subject. The record fails to show that plaintiff was informed that he was expected to bid at the partition sale. It rather indicates that plaintiff had an imperfect familiarity with the English language and evidently believed when he signed the contract on March 5th that he was simply agreeing to purchase the property.

Defendant argues that a contract by a guardian with a prospective purchaser that the purchaser will bid a certain amount at a judicial sale, is valid and enforceable, and this may be conceded; but nowhere in this contract do we find any recital or reference to the $700 received by defendant for the purposes set forth in the receipt of March 4th.

Defendant also says that if the instruments are repugnant then the last instrument governs; but this does not help defendant for the only reference to the $700, which is the subject matter of this suit, is in the first paper or receipt of March 4th. If the last instrument governs, there is no provision therein for the payment of any earnest money. It is not necessary for a decision of this case to determine whether the contract of March 5th is or is not valid.

The court was justified in finding from the evidence that plaintiff deposited his money as earnest of his intention to purchase the property for $8000; that the defendant agreed to lend him $7000 secured on the premises in the event the sale was consummated. It is almost self-evident that this mortgage was to constitute the major portion of the purchase price. It is clear that the reason why the deal fell through was the bank's unwillingness, in view of the withdrawal of deposits, to make the loan when plaintiff requested

plaintiff is defendant and a bill of lading delivered by defendant to plaintiff. It was held that this constituted one contract for the carriage of the commodity. In the instant case it is apparent that plaintiff was contracting only with reference to the purchase of the property and the receipt which he received is clear on this subject. The record fails to show that plaintiff was informed that he was expected to bid at the partition sale. It rather indicates that plaintiff had an imperfect familiarity with the English language and evidently believed that he signed the contract on behalf of the man who was acting to purchase the property.

Defendant claims that the parties will be governed with a preliminary understanding that the purchaser will use a certain amount of a building code, in valid and enforceable, and this may be understood; but nowhere in this contract do we find any reliance or reference to the ETC specifications for the purchase and fails in the results of Lewis 40.

Defendant also says that if the instruments are unclear then the last instrument prevails; but this does not help defendant for the only reference to the ETC, which is the subject matter of this suit, is in the first paper or receipt of March 4th. If the last instrument governs, there is no provision therein for the payment of any earnest money. It is not necessary for a decision of this case to determine whether the contract of March 4th is or is not valid.

The court was justified in finding from the evidence that plaintiff deposited his money on account of his intention to purchase the property for ETC; that the defendant agreed to lend him $7000 desired on the premises in the event the sale was consummated. It is clear with-drawal this transaction was to constitute the major portion of the purchase price. It is clear that the reason why the loan fell through was the bank's unwillingness, in view of the withdrawal of deposits, to make the loan when plaintiff requested

that the bank make good on its undertaking in this respect. In the light of all these circumstances the conclusion of the trial court was in accordance with justice.

It seems that plaintiff filed in the Probate court of Cook county a claim for the return of his $700 in the estate of William Coolahan, a minor, for which the defendant bank was acting as guardian, and at the time of the instant trial this claim was still pending. It is argued that the pendency of this former claim would cause an abatement of the instant suit. As a general rule the pendency of a prior action or suit for the same cause between the same parties will abate a later action or suit. 1 C. J. 45; Haas v. Eichheimer, 220 Ill. 193. The parties are not the same in the instant action as in the claim filed in the Probate court; there the claim was against the Estate of Coolahan, a minor; here the action is against the bank directly.

Furthermore, the record shows that in the final account of the Coolahan estate filed in the Probate court no accounting is made of this $700 received by The Stock Yards Trust & Savings Bank. Counsel for plaintiff says that at no place in the record is the $700 accounted for, either in the guardian proceedings or in the master's report at the partition sale. The point that the claim filed in the Probate court abates the instant case is without merit.

The judgment is proper and is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

that the bank was paid on its assumpsit in this respect. In the light of all these circumstances the conclusion of the trial court was in accordance with justice.

It seems that plaintiff filed in the Probate court of Cass county a claim for the return of his fund in the estate of William Buchanan, a minor, for which the defendant bank was acting as guardian, and at the time of the instant trial this claim was still pending. It is argued that the pendency of this former claim would create an abatement of the instant suit. In a general sense the pendency of a prior action or suit for the same cause between the same parties will abate a later action or suit. 1 C. J. 45; Ham v. Finkenauer, 87 Ill. 128. The parties are not the same in the instant action as in the claim filed in the Probate court since the claim was against the estate of Buchanan, a minor; here the action is against the bank directly.

Furthermore, the record shows that in the final account of the Buchanan estate filed in the Probate court the accounting is made of bills paid received by the First State Trust & Savings Bank. Counsel for plaintiff says that at no place in the record is the bill accounted for, either in the pending proceedings or in the master's report of the partition suit. The point that the claim filed in the Probate court during the instant case is without merit.

The judgment is proper and is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

36906

ERNEST FREEBERG,
Appellant,

vs.

J. W. MANZ,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

98 17

272 I.A. 616

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On the evening of February 12, 1931, near the street intersection of May and 83rd streets in Chicago, plaintiff was struck by an automobile owned and driven by defendant; he brought suit and upon trial the jury found the defendant not guilty; from the adverse judgment on the verdict plaintiff appeals.

May street runs northerly and 82nd street crosses it at right angles going easterly; defendant's car was going east on 82nd street and plaintiff was standing near the southeast corner of the intersection when he was struck.

There was somewhat variant testimony, but the jury could properly believe that the defendant with his wife who lived at or near the southwest corner of the intersecting streets drove out of their garage and turned east on 82nd street, approaching May; a political meeting was to take place in a school house on the northeast corner and there was a large number of people, perhaps five to eight hundred, "milling back and forth" across the intersecting streets; loud speakers were giving forth music; defendant observing the crowd, started across May street driving approximately five miles an hour, and he says that in order to avoid hitting anyone he slowed down to a speed as slow as he possibly could go; as he crossed May street he looked in every direction and was watchful so as not to strike anyone; as he came up to the east crosswalk it was clear. Plaintiff, who purposed to attend the political meeting, had parked his car on the south side of 82nd street east of May, the

Board

Estate Division.

Appellant,

vs.

J. V. Lutz,

Appellee.

Appeal from Cuyahoga County

of Error Court.

972 I.A. 616

Mr. Justice Lambert delivered the opinion of the court.

On the evening of February 24, 1916, near the street lamp-
posts of any one road stands in Cleveland, Charlotte was struck
by an automobile owned and driven by defendant; he brought suit and
claim that the jury found it a defendant and reality; from the ad-
verse judgment on the verdict plaintiff appeals.

Her attorney from Charlotte and Ohio street crossing is on
eight engine going northerly and the going east on
Ohio street, and plaintiff was attempting cross the southbound corner
of the intersection when he was struck.

Perry was accorded various weaknesses, but the jury must
reasonably believe that the testimony with his wife was tried by or
near the southwest corner of the intersection either there was of
their going and turning road on Ohio street, approaching but a
sufficient meeting was to come close to a robust house on the north-
east, because the house was a large number of people, perhaps five in
right hundred. Neither him nor their' notice the intervening
streets; that circumstances were fifty feet south; defendant observing
the crowd, started across day street driving approximately five
miles an hour, and he says that he never to avoid striking anyone he
stopped then to a point so close as to be practically touch her; so it
appears day street he looked in every direction and saw nothing
so not to strike anyone; he he came up to the near crossing it was
clear. Finally, she proceeded be behind the northbound auto, had
passed his car on his south side of Ohio street when a car, the

second car from the corner; after alighting from his car he walked west on the sidewalk on 83rd street and stepped off the curb to go northward on the east crosswalk toward the school house; he says that after he had gone some feet he noticed that the hind end of his car was sticking out several inches from the line of the other cars parked on 83rd street, and that he was standing looking at his car, facing east, and was putting on his gloves when he was struck in the left leg by the fender of defendant's car. Defendant says that the right side of his car was about four or six inches from the cars parked on the south side of 83rd street; that he was going not over five miles an hour when suddenly he saw plaintiff in front of his car; he stopped instantly; plaintiff was knocked down. Defendant offered to take plaintiff to the hospital but plaintiff replied, "I am all right, leave me alone," but subsequently defendant took plaintiff to the hospital. When plaintiff was struck defendant's entire car was over the east crosswalk; as it is in evidence that this car is eleven and one-half feet long plaintiff must have been approximately this distance east of the crosswalk when he was struck.

The facts presented a proper question for the jury to determine - whether defendant was negligent and whether plaintiff was guilty of contributory negligence. The jury could reasonably conclude that defendant was driving slowly and was watchful to avoid an accident. The jury could also conclude that plaintiff in standing in the street at a car's length off the crosswalk with his back toward any approaching automobile from the west, while he was putting on his gloves, was guilty of contributory negligence. This court could not say that the finding in this respect was manifestly and clearly against the weight of the evidence.

Plaintiff complains of instructions given on behalf of the defendant, both as to number and substance. The brief does not

around one from the corner; after alighting from his car he walked over to the sidewalk on that street and stopped at the curb in preparation to the road crossing toward the waiting trucks; he saw that after he had gone some feet he noticed that the blue car of his was stalking out around inches from the line of the other compartment on that street, and then he was plunging leaping at his car, finding most, and was writing on the gloves when he was struck in the half by the front of defendant's car. Defendants said that the right side of his car was about four or six inches from the west gutter on the south side of that street that he was going east on the south side of that street. He was not sure whether or not was driving in the middle of the street. Defendant's car was moving at the time of the collision. The plaintiff testified that he was crossing the street at the time of the collision. Defendant testified that the plaintiff was walking in the middle of the street. "I am all right, I was no worse," but subsequently defendant testified to the hospital. The plaintiff was struck defendant's motor car was over the road crossing; as it is in evidence that this car is owned and controlled that long plaintiff must have been approximately this distance east of the crosswalk when he was struck.

The trial presented a great question for the jury to answer whether defendant negligently the driver plaintiff was guilty of contributory negligence. The jury made reasonably conclude that defendant's car driving slowly and was entitled to make an inference. The jury could also conclude that plaintiff in going to the corner of a waiting bus for passing with his back toward the approaching automobile from the rear, while he was waiting on sidewalk, was guilty of contributory negligence. This could not say that the finding in this respect was unreasonable and clearly against the weight of the evidence.

Plaintiff complained of instructions given on behalf of the defendant, but on to number and sufficiency. The trial was not

set forth the instructions but refers to them only by number with counsel's construction of them. We have repeatedly held that instructions criticized should be set forth in full in the brief. Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392; Sterling Midland Coal Co. v. Ready & Callaghan Coal Co., 236 Ill. App. 403; Spencer v. C. N. W. Ry., 249 Ill. App. 463; Roy Iverson Co. v. United States Lloyds, Inc., 251 Ill. App. 150; Cory v. Woodmen Accident Co., 253 Ill. App. 20. However, plaintiff in his reply brief for the first time sets forth some of the instructions of which he complains. We find no reversible error in this respect. They are, for the most part, stock instructions and the criticism against them is somewhat refined and not of substantial weight.

We are in sympathy with the complaint that an undue number of instructions on behalf of defendant were given. Such practice has been frequently condemned. Nelson v. Chicago Ry. Co., 143 Ill. App. 98; Cohen v. Weinstein, 231 Ill. App. 84; Daubach v. Drake Hotel Co., 243 Ill. App. 298.

We would not be justified in reversing because of any possible error in the instructions. The decision of the case rested almost wholly upon the opinion of the jury on the facts. The judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

and that the determination but either is then only by taking this account's construction of them. We have frequently held that instructions originally should be set forth in full in the brief. Harris v. Finch Flour Stores, Inc., 216 Ill. App. 347; Chicago Milling Co. v. Hardy & Brinkman Coal Co., 220 Ill. App. 418; Barnett v. Ill. R. R., 229 Ill. App. 471; Cor Investment Co. v. United Fruits Stores, Inc., 248 Ill. App. 189; Kurz v. Chicago Railway Co., 252 Ill. App. 32. However, contrary to the reply brief for the first time made form of the instructions of which he complains. We find no reversible error in this course. Then are, for the most part, where instructions are the motions against them in numerous refined and set of substantial weight.

We are in agreement with the contention that no undue prejudice of instructions be found of defendant here given. Each question has been frequently contested. Cohen v. Chicago Ry. Co., 144 Ill. App. 94; Cohen v. Finnegan, 198 Ill. App. 80; Chicago v. Sprat Lumber Co., 244 Ill. App. 194.

We would not be justified in overturning verdicts of any possible error in the instructions. The evidence of the case stated clearly upon the question of defendant's negligence in the injury to the plaintiff. The judgment is therefore affirmed.

AFFIRMED.

Holdsworth, P. J., and O'Connor, J., concur.

36572

M. K. NAGLE,
Appellee,

vs.

J. L. HANSON COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

99

17

272 I.A. 617

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the endorsee of a promissory note for $1,000, brought suit against the defendant maker to recover the principal and interest due. There was a jury trial and a verdict and judgment in plaintiff's favor for $1311.02. Defendant appeals.

There was a prior trial of this case where plaintiff had judgment on a directed verdict, but on appeal to this court the judgment was reversed and the cause remanded. (Nagle v. J. L. Hanson Co., 262 Ill. App. 160.) On that trial defendant sought to show that plaintiff was not a bona fide holder of the note; that it was executed by defendant without authority and without consideration.

Plaintiff offered evidence tending to establish these contentions but on objection by counsel for defendant most of this evidence was erroneously excluded; and principally for these erroneous rulings we reversed the judgment and remanded the cause. On the re-trial of the case, where the same defenses were interposed, much less evidence appears to have been offered than on the first trial.

The note is dated August 15, 1927, and provides: "Ten days sight after date we promise to pay," etc. In our former opinion we held that the note was due and payable 10 days after it was presented to the defendant for payment, that the evidence showed it was presented to the defendant by a bank January 8, 1928, and payment demanded January 18, 1928. On the second trial plaintiff produced

1927.

E. E. KANCE,
Appellee,

vs.

E. L. FARMER COMPANY,
a Corporation,
Appellant.

APPEAL FROM SHERIFF COURT
OF DUVAL COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the endorsee of a promissory note for $1,000, brought suit against the defendant maker to recover the principal and interest due. There was a jury trial and a verdict and judgment in plaintiff's favor for $1211.02. Defendant appeals.

There was a prior trial of this case which plaintiff had judgment on a directed verdict, but on appeal to this court the judgment was reversed and the cause remanded. (Kance v. E. L. Farmer Co., 93 Fla. 422, 112 So. 1; on that trial defendants sought to show that plaintiff was not a bona fide holder of the note; that it was received by defendant without consideration and without warranties.

Plaintiff offered evidence tending to establish these contentions but an objection by counsel for defendant most of this evidence was erroneously excluded; and particularly for these erroneous rulings we reversed the judgment and remanded the cause. On the re-trial of the case, where the same defenses were interposed, much less evidence appears to have been offered than on the first trial.

The note is dated August 15, 1927, and provides: "Ten days after date we promise to pay," etc. In our former opinion we held that the note was due and payable 10 days after it was presented to the defendant for payment, that the evidence showed it was presented to the defendant by a bank January 6, 1928, and payment demanded January 16, 1928. In the second trial plaintiff produced

the note and testified that she obtained it from the payee the latter part of November, 1927, and shortly thereafter took up the matter of its payment with Mr. Hanson, who, the evidence shows, signed the note as president of the defendant corporation. "I took it up with Mr. Hanson I would say about three times, the latter part of November, shortly after I had taken the note. And twice on the train, as I used to ride home with Mr. Hanson frequently from business and he asked me at that time if I would hold the note for at least thirty days until after their Christmas money came in, so that they would be in a better position to pay it, and at the same time he asked me if I would give the company an additional loan and take their note and I told him at the time I wasn't in a position to do that. After that I turned it over to my attorney, Mr. Feigenholtz, who was representing me, to present it to the bank. The note was not paid. I never got the money." It appeared that Hanson had died and counsel for defendant objected, saying, "Now I want to move that all her testimony about her conversation with Mr. Hanson be stricken out on the ground that it is with an officer of the corporation, and he is dead, and under the statute it isn't competent." The objection was overruled, and this ruling is urged as ground for reversal. The argument seems to be that with this evidence excluded, there was no evidence to show any demand was made for payment, and since on the formerappeal we held that the note was not payable until ten days after demand, the action would not lie as being prematurely brought. The argument is that the ruling was erroneous because section 4 of our Evidence act (chapter 51) prohibits plaintiff from testifying to conversations she had with Hanson when she testified she demanded payment of the note from him. That section provides, "in every action, suit or proceeding a party to the same who has contracted with an agent of the adverse party - the agent having since died - shall not be a

the note and qualified that the statute of frme the paper the lib-
ter part of November, 1917, and shortly thereafter been by the
author of the payment with Mr. Dawson, who, the evidence shows,
signed the note as president of the defendant corporation. "I
took it up with Mr. Dawson I would not check there first, the lat-
ter part of November, shortly after I had taken the note. And
twice on the train, as I used to ride home with Mr. Dawson fre-
quently from business and he asked me at that time if I would take
the note for at least thirty days until after their Christmas money
came in, so that they would be in a better position to pay it, and
at the same time he asked me if I would give the company an addi-
tional loan and take their note and I told him at the time I
wasn't in a position to do that. After that I turned it over to my
attorney, Mr. Pellegrinelle, who was corresponding on, to present it
to the bank. The note was not paid. I never got the money." It
appeared that Dawson had died and counsel for defendant objected,
saying, "Now I want to move that all her testimony about her con-
versation with Mr. Dawson be stricken out on the ground that it is
with an officer of the corporation, and he is dead, and under the
statute it isn't competent." The objection was overruled, and this
ruling is urged as ground for reversal. The argument seems to be
that with this evidence excluded, there was no evidence to show my
demand was made for payment, and since on the transaction as held
that the note was not payable until ten days after demand, the de-
fense would not lie as being prematurely brought. The argument is
that the ruling was erroneous because section 4 of our Evidence Act
(chapter 51) prohibits plaintiff from testifying to conversations
she had with Dawson when she testified the demanded payment of the
note from him. That section provides, "In every action, suit or
proceeding a party to the same who has contracted with or right of
the adverse party - the same having since died - shall not be a

competent witness as to any admission or conversation between himself and such agent," etc. If the testimony of plaintiff, objected to, which we have above quoted, amounted solely to "admissions or conversations between" plaintiff and Hanson, the testimony should have been excluded. But if this testimony, or part of it, amounted to a "transaction" it was competent and the ruling was proper. Helbig v. Citizens' Ins. Co., 234 Ill. 251; Lueth v. Goodknecht, 345 Ill. 197. Part of the testimony was clearly a "conversation" as mentioned in the statute, because the witness testified that when she took up with Mr. Hanson the matter of the payment of the note, he asked her to wait until after Christmas. This obviously should have been excluded had a proper objection been made. We think the testimony of the witness that she took up with Hanson the matter of the payment of the note was properly admitted under the authority of the two cases last cited. The objection that all of the above quoted testimony of this witness was improper and should be excluded was too broad and was therefore properly overruled. First Nat'l Bank of Hayward, Wis. v. Gerry, 195 Ill. App. 513.

In the Lueth case, supra, suit was brought on a promissory note given to the partnership of Lueth Bros. by the defendants. On the trial one of the partners, George C. Lueth, was dead and the defense interposed was that the note had been paid to George during his lifetime, and defendant testified, over objection, to this effect. It was held that section 4 of the Evidence act did not prohibit such evidence because it was not a "conversation" within the meaning of section 4, but amounted to a transaction.

We hold that part of the testimony of the witness was admissible because it amounted to a transaction, and because the objection was too broad it was properly overruled. It would be somewhat anomalous were we to reverse the judgment because counsel for plaintiff neglected to put in the written proof that demand for payment had

important witness as to any admission or conversation between himself and such agent," sec. 1. If the testimony of plaintiff, objected to, which we have there quoted, necessarily relied to "modifications or contradictions between" plaintiff and Dawson, the testimony should have been excluded. But if this testimony, or part of it, amounted to a "transaction" it was competent and the ruling was proper. Bailey v. Citizens' Ins. Co., 244 Ill. 483; Lewis v. Goodhousen, 248 Ill. 187. Part of the testimony was clearly a "conversation" so excluded in the statute, because the witness testified that when she took up with Dr. Dawson the matter of the payment of the note was properly omitted under the authority of the two cases last cited. The objection that all of the above quoted testimony of this witness was improper and should be excluded was too broad and was therefore properly overruled. First Nat'l Bank of Kewanee, Ill. v. Gorry, 192 Ill. 420, 426.

In the instant case, Hurst, suit was brought on a promissory note given to the partnership of Smith Dawson, by the defendants. In the trial one of the partners, George E. Smith, was dead and the defense interposed was that the note had been paid to George during his lifetime, and defendant testified, over objection, to this effect. It was held that section 4 of the evidence act did not prohibit such evidence because it was not a "conversation" within the meaning of section 4, but amounted to a transaction.

We hold that part of the testimony of the witness was admissible because it amounted to a transaction, and because the objection was too broad it was properly overruled. It would be somewhat anomalous were we to reverse the judgment because counsel for plaintiff objected to put in the written proof that dawson had payment had

been made, which document was put in evidence on the first trial, as appears from our first opinion (262 Ill. App. 160.) However, after January 1st next such questions will not be embarrassing because then we can demand the production of the written document in this court. Section 93, chap. 110 Cahill's 1933 Statutes. This procedure has been the English rule (Order 58, rule 4) for many years and has been the law of Massachusetts since 1913.

Defendant further contends that plaintiff was not a holder in due course and therefore the judgment should be reversed. In support of this counsel says: "The note sued upon herein, not being due until ten days after a demand was made, was incapable of becoming the property of a holder in due course as defined by the Negotiable Instruments Act." Obviously, this argument is directly contrary to the statute. Section 52, chapter 98, defines a holder in due course as one who has taken the instrument under the following conditions: "2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Plaintiff produced the note, which on its face appeared to be unpaid, and testified that she obtained it some time the latter part of November, 1927, (which was before the note was due); this made out a prima facie case.

The defense sought to be made was that Miss Schwebs, the payee of the note, was employed by the defendant maker, and was indebted to it in the sum of more than $1500 at the time the note was made, and therefore it was without consideration. But there is little evidence offered to sustain this contention. The by-laws of defendant were not offered in evidence, nor were defendant's books,

been made, which decision was put in evidence on the first trial, he appeals from our first opinion (Ind. Ill. App. Ct.). However, after January 1st most such questions will not be encountering because they be one dozen the provisions of the uniform instruments in this state. Section 33, ch. 110 Ill.'s 1957 Statutes. This statute has been the English rule (Crose v. Pole 4) for many years and has been the law of Massachusetts since 1874.

Defendant further contends that plaintiff was not a holder in due course and therefore the judgment should be reversed. In support of this contest says: "The note sued upon herein, not being due until ten days after a demand was made, was incapable of transfering the property of a holder in due course as defined by the Negotiable Instruments Act." Obviously, this argument is directly contrary to the statute. Section 52, chapter 43, defines a holder in due course as one who has taken an instrument under the following conditions: "1. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored if such was the fact. 2. That he took it in good faith and for value. 3. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Plaintiff produced the note, which on its face appeared to be signed, and testified that he obtained it some time the latter part of November, 1957, which was before the note was first made not a mere fiscal sham.

The defense sought to be made was that Alan Coleman, the payee of the note, was employed by the defendant bank, and was indebted to it in the sum of more than $1000 at the time the note was made, and therefore it was without consideration. But there is little evidence offered to sustain this contention. The by-laws of defendant were not offered in evidence, nor were defendant's books,

except that defendant's bookkeeper and secretary testified that she wrote "those figures on those two sheets. These are amounts sent to her as traveling expense on the road;" that the payee, Miss Schwebs, was working for defendant and the amounts indicated by the sheets totalled $1635.03. This witness further testified in speaking of Miss Schwebs, "She didn't have a salary. She was supposed to have a drawing account and was supposed to work that amount out in due course of time." This evidence falls far short of showing that at the time the note was executed Miss Schwebs was indebted to the defendant in more than $1600. The evidence is to the effect that this amount of money was sent to her as traveling expenses while she was on the road working for the defendant; that Miss Schwebs had a drawing account; but it does not appear that she was indebted to the defendant company for this money she used as traveling expenses.

Furthermore, there is no evidence in the record that plaintiff, the indorsee of the note, had any intimation at the time she obtained the note from the payee, that there was any defense to the note.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

proof that defendant's bookkeeper and secretary testified that she wrote "these figures on these two sheets. These are amounts sent to her as traveling expenses on the road;" that the payee, Alice Sawyer, was working for defendant and the amounts indicated by the sheets totalled $1455.00. This witness further testified in speaking of Alice Sawyer, "She didn't have a salary. She was supposed to have a drawing account and was supposed to work that amount out in the course of time." This evidence tells for more or showing that at the time the note was executed Alice Sawyer was indebted to the defendant in more than $1500. The evidence is to the effect that this amount of money was sent to her as traveling expenses while she was on the road working for the defendant; that Alice Sawyer had a drawing account; but it does not appear that she was indebted to the defendant company for this money she used as traveling expenses.

Furthermore, there is no evidence in the record that plaintiff, the indorsee of the note, had any information at the time she obtained the note from the payee, that there was any defense to the note.

The judgment of the district court of Ford county is affirmed.

AFFIRMED.

McCreary, J., and Burnett, J., absent.

36677

IRENE SPIERING,
(Plaintiff)
Appellee,

vs.

M. A. SKUBIC and HARRIS BROS. CO.,
(Defendants).

On Appeal of HARRIS BROTHERS COMPANY,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

272 I.A. 617

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Irene Spiering brought an action against M. A. Skubic and Harris Brothers Company, a corporation, to recover damages for personal injuries claimed to have been sustained by her on being struck and injured by an automobile driven by defendant Skubic, an employee of Harris Brothers Company. There was a jury trial and a verdict and judgment in plaintiff's favor for $3,500, and defendant Harris Brothers Company appeals.

The record discloses that Skubic was employed by defendant Harris Bros. Company, a corporation, for about ten years at one of its branch offices in Berwyn, Illinois; for about nine years of the time he was assistant manager of the branch and for about a year prior to the accident, March 14, 1931, was manager of the branch; his office hours were from 8:30 in the morning until about 8:30 in the evening. He lived in Chicago about three miles from his place of employment, and on the morning of March 14, 1931, he was driving his automobile to his place of employment, which had been his custom for some time. When he was about four or five blocks from his home and about two and a half miles from his place of employment, he drove on the south side of a westbound street car in West 26th street (an east and west street); plaintiff had just alighted from the front platform on the north of the street car, passed in front of the street car to the south, going to her place of employment a short distance away, when she was struck by

Skubic's automobile and severely injured.

An ordinance of the City of Chicago made it unlawful for one operating an automobile to pass a street car on the left when overtaking it. There is some evidence in the record to the effect that the reason Skubic passed to the south of the street car was that there had recently been a very heavy snowfall of approximately sixteen inches, which partially blocked his path north of the street car.

In this court defendant Harris Bros. Co. makes no contention that plaintiff was guilty of contributory negligence nor that Skubic was not negligent, nor that the verdict was excessive, but its sole contention is that its motion for a directed verdict at the close of all the evidence should have been sustained because there was no evidence tending to show that Skubic at the time of the accident was performing any duties for it.

The question therefore is, Is there any evidence, viewed most favorably to plaintiff tending to show that Skubic at the time in question was performing any service for his employer Harris Bros. Co.?

The general rule of law is that a person's employment does not begin until he reaches the place where he is to work, and that it does not continue after he has left his place of employment, and that "There must be present a causal relation between the work, or what is done incidental to it, and the injury which occurs" before the employer can be held liable for the employee's tort. Schafer v. Industrial Com., 343 Ill. 573. The liability of Harris Bros. Co. in this case is claimed under the doctrine of respondeat superior. The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury. There is an exception to this general rule in the case of master and servant, and the master is liable for the negligence

Bowie's reasonable and exercise taken.

An ordinance of the city of Chicago made it unlawful for one operating an automobile to pass a street car on the left when approaching it. There is some evidence in the record to the effect that the street car was in the act of stopping to let off passengers when the accident happened. Bowie's negligence in the premises, which partially caused his own death at the hands of the driver of the other car, was not negligence, nor that the vehicle was unsafe, but the sole contention is that the action for a direct wrong of the driver of the vehicle should have been sustained because there was no evidence tending to show that Bowie at the time of the accident was exercising any care for it.

The question therefore is, in view of evidence, viewed most favorably to plaintiff herein, in view that Bowie at the time in question was performing any service for his employer Davis Bros. Co.?

The general rule of law is that a person's employment does not begin until he reaches the place for him to work, and that it does not continue after he has left his place of employment, and that "there must be proof of a causal relation between the work, or what is done incidental to it, and the injury before liability" before the employer can be held liable for the employee's death. Schaffer v. Industrial Com., 247 Ill. 89. The liability of Davis Bros. Co. in this case is claimed under the doctrine of Pennsylvania Railroad v. Goodman, supra. The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury. There is an exception to this general rule in the case of master and servant, and the master is liable for the negligence

of his servant when the servant is acting within the scope of his employment, and the relation must exist at the time and in respect to the particular transaction out of which the injury arose. "Outside the scope of his employment a servant is as much a stranger to his master as any third person, and an act of the servant not done in the execution of services for which he is engaged cannot be regarded as the act of the master." Johanson v. Johnston Printing Co., 263 Ill. 236; Rupp v. Walgreen, 270 Ill. App. 346.

Applying the law as above stated to the instant case, we are of opinion that at the time in question Skubic was not engaged in the business of Harris Bros. Co., or rendering that company any service. He was on his way to work some two and a half miles away from the place of the accident. He was driving his own automobile for his own convenience, the evidence showing he could have gone to his place of employment by bus. But plaintiff contends that Skubic was required to have an automobile to perform his duties for Harris Bros. Co., and the argument, as we understand it, is that although Skubic at the time in question was not performing any of the service for which he was employed, yet since he was required to have an automobile, his driving to his place of employment on the morning in question was incidental to his duties, and that this is sufficient to hold Harris Bros. Co. liable for Skubic's negligence.

The evidence shows that for about a year prior to the time of the accident Skubic was manager of a branch office of Harris Bros. Co. in Berwyn, and that no other person was employed at that branch; that he was to begin his work at 8:30 in the morning and work until 5:30 in the evening, except one-half hour for his lunch and one-half hour for his supper at about six in the evening; that when he left for lunch and supper he closed the place and it remained closed until he returned; that several times he made calls for the purpose of collecting money for Harris Bros. Co., and

of his servant when the servant is acting within the scope of his employment, but the relation must exist at the time and in respect to the particular transaction out of which the injury arose. "Unless the keeper of his employment a servant is as much a stranger to the master as any third person, and the act of the servant not done in the execution of services for which he is employed cannot be imputed to the act of the master." Johnson v. Interstate Ry. Co., 201 Ill. 486; Dunn v. Talcott, 197 Ill. 499, 502.

Applying the law as above stated to the instant case, we are of opinion that at the time in question Clarke was not engaged in the business of Harris Bros. Co., or conducting that company's affairs. He was on his way to work some two and a half miles away from the place of the accident. In not driving his own automobile for his own convenience, the evidence showing he could have gone to his place of employment by car, but primarily because that Clarke was required to have an automobile to perform his duties for Harris Bros. Co., and the employment, as he interpreted it, is that although at the time in question for that particular day of the service for which he was employed, yet since he was required to have an automobile, his driving it to his place of employment or the morning is question was incidental to his duties, and that this is sufficient to hold Harris Bros. Co. liable for Clarke's negligence.

The evidence also tends to show a year prior to the time of the accident during the absence of a regular driver of Harris Bros. Co. in Europe, all that an other person was employed of that company during the time the car was at rest in the garage and was used only in the morning and evening, Clarke accompanied him for the first week and one-half hour for his employer at about six in the morning; that when he left for lunch and supper he closed the glass and it remained closed until he returned; that several times he made calls for the purpose of collecting money for Harris Bros. Co., and

other calls to obtain signatures of customers to contracts, and that these calls were made after his office hours; that one of the calls was made at nine o'clock in the evening; that Skubic had no means of transportation except his automobile in making the calls; that he could not do this work without the use of his automobile; that Harris Bros. Co. knew that Skubic owned an automobile and knew that he used it to make calls. The evidence further shows that at the time of Skubic's employment he was not asked by Harris Bros. Co. whether he owned an automobile, but Harris Bros. Co. sent him a questionnaire asking a number of questions, from answers to which it appeared that he did own an automobile. Skubic used the automobile as he saw fit; he paid for his own gas and oil and received no allowance from his employer for its upkeep.

We think the evidence all shows, without contradiction, that at the time in question Skubic was driving his automobile for his own convenience to his place of employment and was not performing any service for Harris Bros. Co. In these circumstances plaintiff cannot recover against Harris Bros. Co., and there should have been a directed verdict as requested. Plaintiff's claim is solely against Skubic.

If employers were liable for the negligence of their employees while driving to and from their work in automobiles, every employer would be subject to numerous damage suits, because it is common knowledge that in these times many thousands of persons drive to and from their work in automobiles.

The liability sought to be fastened on Harris Bros. Co., a corporation is unwarranted under the law and the evidence. If it were the only defendant we would be required to enter judgment here in its favor; but since we are not warranted in finding facts necessary to render judgment for both defendants, and as the judgment was a unit as to both, being erroneous as to one it must be reversed and remanded as to both. West Chicago Street R. R. Co.

either could to obtain signatures of customers to contracts, and that these calls were made after the officer knew; that one of the calls was made at nine o'clock in the evening; that Smith had no means of transportation except his motorcycle in making the calls; that he could not do work core without the use of his motorcycle; that Fourth Term, 1a, have that Smith owned no motorcycle and knew that he used it in his calls. The relations further show by the view of Smith's employers in the cut issue of Fourth Term, 3a, whether he owned a motorcycle, but Fourth Term, 3a, sets forth a questionnaire asking a number of questions, from answers to which it appeared that he did own a motorcycle. Smith used the motorcycle on the day left; he paid for his own gas and oil and received no allowance from his employer for its upkeep.

We think the evidence all above, without contradiction, that at the time in question Smith was driving his motorcycle in his own convenience in his place of employment and was not particular for any service for Fourth Term, 1a. In these circumstances plaintiff cannot recover against Fourth Term, 1a., and there should have been a directed verdict as requested. Plaintiff's claim is solely against Smith.

If employers were liable for the negligence of their employees while driving to and from their in motorcycles, every employer would be subject to numerous claims with, remember it is common knowledge that in these times many thousands of persons drive to and from their work in motorcycles.

The liability sought to be fastened on Fourth Term, 1a., a corporation is unauthorized under the law and the evidence. If it were the only defendant we would be required to make judgment here in its favor; but since we are not warranted in finding facts necessary to render judgment for both defendants, and as the judgment was a nuisance as to both, doing errorness as to one it must be reversed and remanded as to both. Fourth Division Fifth S. Ct.

v. Morrison, etc. Co., 16[illegible] Ill. 233; Valley v. Ill. Tunnel Co., 178 Ill. App. 388.

The judgment of the Superior court of Cook county is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

8. Hoffman, Ibid. 56, 241, 243; Fuller v. The Republic, 179 Ill. App. 514.

The judgment of the Superior Court of Cook County is hereby and the same reversed for further proceedings consistent with the views herein expressed.

REVERSED AND REMANDED.

Matchett, J. J., and Niemeyer, J., concur.

36680

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Theodore C. Evers, Relator,
Plaintiff in Error,

vs.

THE COMMISSIONERS OF LINCOLN PARK
et al., Respondents,
Defendants in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

272 I.A. 617

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error Theodore C. Evers seeks to reverse a judgment entered by the Circuit court of Cook county sustaining a demurrer to his petition praying for a writ of mandamus and dismissing the petition at his costs.

May 20, 1922, Theodore C. Evers filed his petition against the Commissioners of Lincoln Park and others, praying that a writ of mandamus issue commanding them to reinstate him in his position of clerk, where he had been engaged as a civil service employee for a number of years, and that he be awarded his salary from the time of his discharge. Seven days thereafter defendants filed their general and special demurrer. Nothing was done in the case until July 28, 1922, when on petitioner's motion an order was entered changing the action to assumpsit, and his declaration was filed, to which defendants interposed a general and special demurrer. Nothing further was done until March 6, 1923, when petitioner served notice that he would ask that defendants' demurrer to his declaration be overruled. The record next shows that nearly a year afterward, January 4, 1924, petitioner filed a similar notice, but no order was entered; that more than a year thereafter, January 18, 1925, an order was entered that the cause be placed on the contested motion calendar. The next that appears is that more than three years afterward, February 14, 1928, an order was entered

No. 2272

IN THE MATTER OF THE PETITION
OF THE HON. THEODORE G. BYERS, JUDGE,
OF THE 8TH JUDICIAL DISTRICT,
PLAINTIFF IN ERROR,

vs.

THE COMMISSIONERS OF LINCOLN PARK
ET AL., DEFENDANTS,
DEFENDANTS IN ERROR.

2272 I.A. 017

EMBOSS BY OFFICE SUPPLY
BY OCCI SUPPLY.

EX. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error Theodore G. Byers seeks to reverse a judgment entered by the circuit court of cook county sustaining a demurrer to his petition praying for a writ of mandamus and dismissing the petition at his costs.

May 28, 1920, Theodore G. Byers filed his petition against the Commissioners of Lincoln Park and others, praying that a writ of mandamus issue commanding them to reinstate him in his position of clerk, where he had been employed as a civil service employee for a number of years, and that he be awarded his salary from the time of his discharge. Byers then November defendants filed their general and special demurrer. Nothing was done in the case until July 22, 1921, when on petitioner's motion he moved the court changing the action to assumpsit, and his declaration was filed, to which defendants interposed a general and special demurrer. Nothing further was done until March 6, 1922, when petitioner served notice that he would ask that defendants' demurrer to his declaration be overruled. The record then shows that nearly a year afterward, January 2, 1923, petitioner filed a similar notice, but no order was entered; that more than a year thereafter, January 12, 1925, an order was entered that the cause be placed on the contested motion calendar. The next that appears is that more than three years afterward, February 14, 1928, an order was entered

substituting counsel for both parties. About fifteen months afterward, May 31, 1929, an order was entered on motion of petitioner's attorneys that the cause be placed on the "passed case calendar." About a year and a half after this, namely, October 6, 1930, an order was entered by agreement of parties that the cause be changed from assumpsit to mandamus, and petitioner was given leave to file an amended and supplemental petition. Some of the old parties to the suit were dropped and new ones introduced, principally on account of the fact of changes of officers in connection with Lincoln Park. October 25, 1930, a general and special demurrer was filed to the amended and supplemental petition. Nothing further was done until February 17, 1931, when it appears petitioner's counsel served notice to call up the demurrer, and on March 28, 1931, an order was entered sustaining the demurrer, the amended and supplemental petition was dismissed, petitioner prayed for and was allowed an appeal upon filing bond within 30 days in the sum of $250 and bill of exceptions (?) within 90 days. Within 30 days petitioner filed his appeal bond, which was approved June 3, 1931. There appears in the record what is designated as a bill of exceptions. Obviously there was nothing that could be put in a bill of exceptions. The appeal was not prosecuted and nothing was done until March 14, 1933, when the writ of error was sued out from this court.

The amended and supplemental petition covers 39 pages of the record, to which are attached as exhibits many pages of the rules of Lincoln Park. The common law method of pleading is still in force in this State and will be until January 1, 1934. Under that practice in an action at law a copy of a document cannot properly be made a part of the pleading as an exhibit. Flew v. Board, 274 Ill. 232.

substituting amended for both parties. About fifteen months afterward, for 22, 1956, we order was entered on motion of petitioner's attorneys that the cause be placed on the "passed docket." About a year and a half after i.e., namely, October 6, 1957, an order was entered by agreement of parties that the cause be changed from exampalt to mandamus, and petitioner was given leave to file an amended and supplemental petition. Some of the old parties in the suit were dropped and new ones introduced, principally on account of the fact of changes of officers in municipalities in Lincoln Park. Defendant Ed, 1958, a demurrer and special demurrer was filed to the amended and supplemental petition. Pending further was done until February 17, 1961, when it appears petitioner's counsel served notice to call up the demurrer, and on March 22, 1961, an order was entered sustaining the demurrer. The amended and supplemental petition was dismissed, petitioner stands its and was allowed an appeal upon filing bond within 30 days in the sum of $200 and bill of exceptions (?) within 90 days. Within 30 days petitioner filed his appeal bond, which the supreme Ct. 6, 1961. There appears in the record what is designated as a bill of exceptions. Obviously there was nothing that could be put in a bill of exceptions. The appeal was not prosecuted and nothing was done until March 14, 1966, when the writ of error was sued out from this court.

The amended and supplemental petition covers 38 pages of the record, to which are attached as exhibits many pages of the ordinances of Lincoln Park. The common law method of pleading is still in force in this State and will be until January 1, 1964. Under that practice it is unlike at law a suit at a document alone properly be made a part of the pleading as an exhibit. Fish v. Hanes, 24 Ill. 548.

In their brief counsel for petitioner say that petitioner brought his suit May 20, 1922, and allege that he was a civil service employee of Lincoln Park from 1909 to March 10, 1921, when he was discharged for political reasons; that since 1911, when the civil service law was made applicable to Lincoln Park employees, he was classified as a civil service employee at a salary of $175 a month; that after he was discharged his duties were assigned to other civil service employees of the Park; and that from the time he was discharged until February, 1922, he had repeatedly assured that he would be reinstated.

The prayer of the amended and supplemental petition was that petitioner be reinstated to his position and that the Commissioners of Lincoln Park be commanded forthwith to pay him the salary he was entitled to from the time of his discharge, March 10, 1921, until the date of the judgment awarding the writ. One of the special grounds for demurrer was that petitioner was not entitled under any circumstances to be reinstated and to recover his salary; and a further point was that the petitioner was guilty of laches in bringing and prosecuting his action.

There are cases holding in substance that a civil service employee who has been wrongfully discharged might be restored to his position by a writ of mandamus, and recover his salary during the period of his wrongful discharge in the same proceeding. People ex rel. Blachley v. Coffin, 279 Ill. 401; McArdle v. City of Chicago, 216 Ill. App. 343. But whatever uncertainty there was in the law in this respect was removed by the Supreme court when it held that the payment of salary to a de facto officer of a city was a good defense to a suit against the city by the de jure officer for the same salary, and that the city need not prove that the payment to the de facto officer was made in good faith. People v. Burdett, 243 Ill. 124; Mittell v. City of Chicago, 327

In their brief counsel for petitioner say that petitioner brought his suit May 20, 1938, and allege that he was a civil service employee of Lincoln Park from 1900 to March 30, 1921, when he was discharged for political reasons; that since 1911, when the civil service law was made applicable to Lincoln Park employees, he was classified as a civil service employee; he was paid a salary of $172 a month; and after he was discharged his duties were assigned to other civil service employees of the Park; and that from the time he was discharged until February, 1938, he had reasonably secured that he would be reinstated.

The prayer of the amended and supplemental petition was that petitioner be reinstated to his position and that the commissioners of Lincoln Park be mandated (ordered) to pay him the salary he was entitled to from the time of his discharge, June 30, 1921, until the date of the judgment awarding the writ. The of the special grounds for demurrer was that petitioner was not entitled under any circumstances to be reinstated and to recover his salary; and a further point was that the petitioner was guilty of laches in bringing and prosecuting his action.

There are cases holding in substance that a civil service employee who has been wrongfully discharged might be restored to his position by a writ of mandamus, and recover his salary during the period of his wrongful discharge in the same proceeding. People ex rel. Sheridan v. Wilson, 279 Ill. 541; Sackin v. City of Chicago, 346 Ill. 490, 518. But however uncertainly there was in the law in this respect was removed by the Supreme court when it held that the payment of salary to a de facto officer of a city was a good defense to a suit against the city by the de jure officer for the same salary, and that the city need not prove that the payment to the de facto officer was made in good faith. People v. Dunphy, 366 Ill. 344; Bittell v. City of Chicago, 347

Ill. 443. And that such a defect in a petition for a writ of mandamus may be reached by special demurrer. People v. Coffin, 282 Ill. 599.

We are also of the opinion that the petitioner was guilty of laches in the prosecution of his suit. While it is generally the law that the question of laches in an action at law must be raised by plea, (contrary to the rule in equity, where it may be raised by demurrer, Dunton v. Hughes, 181 Ill. 132) yet it has been held in mandamus proceedings that the question of laches may be raised by demurrer. Preston v. City of Chicago, 246 Ill. 26. In that case, which prayed for a writ of mandamus, it was contended that the defense of laches must be pleaded, but this contention was denied, the court saying (p. 28): "We held otherwise in Kennesily v. City of Chicago, supra, and Schultheis v. City of Chicago, 240 Ill. 167. We could not reverse the judgment in this case without overruling our decisions in those cases, and we are not convinced that we would be justified by the law in overruling them."

Petitioner alleges that he was wrongfully discharged March 10, 1921. He did not file his petition until May 30, 1922. Two months thereafter he changed the action to assumpsit. Special demurrers were filed to the petition and to the declaration. They were never disposed of. October 6, 1930, which was more than eight years after the suit was brought, petitioner had an order entered changing his action to mandamus. March 28, 1931, more than five months had elapsed before the demurrer was disposed of. On the last mentioned date the demurrer was sustained and the petition dismissed, an appeal prayed and allowed. The bond was filed but the appeal was not prosecuted and the case remained dormant until nearly two years thereafter, March, 1933, when the writ of error was sued out of this court. From this it appears that more than

Cir. 1st. And that such a defect in a petition for a writ of mandamus may be raised by special demurrer. People v. Dalton, 88 Ill. 377.

The 4th also of the reasons that the petitioner was guilty of laches in the prosecution of his suit. While it is generally the law that the question of laches is no matter at law must be raised by plea, (contrary to the rule in equity, where it may be raised by demurrer, Quinn v. Quinn, 101 Ill. 1?7) yet it has been held in numerous precedents that the laches of laches may be raised by demurrer. Crawford v. City of Chicago, 4? Ill. 5?. In that case, which proceeded for a writ of mandamus, it was contended that the defense of laches must be pleaded, but this contention was denied, the court saying (p. 58): "We find authorities in Kennedy v. City of Chicago, supra, and Dodge v. City of Chicago, 90 Ill. 1?7. We could not express the principle in this case without overruling our decisions in those cases, and we are not convinced that we would be justified by the law in overruling them."

Petitioner alleges that he was wrongfully discharged March 14, 1?7?. He did not file his petition until May 4?, 1?8?. Two months thereafter he changed the action to mandamus. Special demurrers were filed to the petition and to the replication. They were sustained. Subject 1, 1?8, which was more than eight years after the suit was brought, petitioner had no water motive changing his action to mandamus. March 28, 1?7?, more than five months had elapsed since the demurrer was sustained. On the last mentioned date the demurrer was sustained and the petition dismissed, no appeal having been taken. The case was filed but the appeal was not prosecuted and the case remained dormant until nearly two years afterwards, March, 1?7?, when the writ of error was sued out of ? ? ? ?. From this it appears that more than

twelve years had elapsed from the time plaintiff was discharged and the time he sued out his writ of error from this court, and he is seeking to recover his salary during that entire period of time. Under the law he was clearly guilty of such laches as would bar him. It is the law that negligence in the prosecution of a suit after its commencement may bar relief. The mere bringing of suit does not relieve the person from the operation of the rule of laches. If he fails to prosecute his suit diligently, the consequence is the same as though no suit had been begun. 21 Corpus Juris, p. 215, (sec. 214); Johnston v. Standard Mining Co., 148 U. S. 360.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

lawyer's power but alleged that the plaintiff was insolvent and for that he sued out his writ of error from this court, and he is seeking to recover his money during that entire period of time. Under the law he was absolute owner of such funds as his own. It is the law that applies in the prosecution of a suit after the commencement of the suit. The mere insolvency of suit does not relieve the person from the consequence of the rule of law. If he wishes to prosecute his suit diligently, the consequence to the court is immaterial as it has been judged. Ex Parte Ferris, 2. Ala. Inst. 1841; Johnston v. Trustees Tuscaloosa, 2 Ala. 9, 320.

The judgment of the Circuit court of Jefferson is affirmed.

Affirmed.

Brickell, C. J., and Stakely, J., concur.

36689

RATHBUN-GRANT-HELLER Co.,
a Corporation,
Appellee,

vs.

DONALD F. CAMPBELL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

102

272 I.A. 617

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment for $821.08 rendered against him on the verdict of a jury.

The record discloses that plaintiff is engaged in the printing business and did printing which he claims was done for Campbell and other parties, for which he has not been paid. Defendant's position is that the work was not done for him and therefore he owes the plaintiff nothing.

On March 14, 1932, plaintiff brought suit against Donald F. Campbell, Frank Spreyer, G. Woodruff Perrett, Kenneth Lockett and William P. Aitken, as copartners doing business as Food Concentrates, Inc. Afterward, by leave of court, he amended his papers so as to make Anthony R. Hester and C. R. Whitfield, Inc., a corporation, additional parties defendant, and all of the defendants were sued as copartners doing business as Food Concentrates, Inc. Perrett was not served with summons, and at the close of plaintiff's case, on motion of plaintiff, the suit was dismissed as to all the defendants except Campbell, Spreyer and Hester. Campbell alone filed an affidavit of merits denying liability; defendants Spreyer and Hester made no defense; they were defaulted and judgment was entered against them and Campbell. Spreyer and Hester testified for plaintiff.

It appears from the evidence that the defendant C. R. Whitfield, Inc., conducted a plant at 361 West Superior street, Chicago, where it was engaged in "dehydrating food specialties."

102

STATE

BARBERS-DRAFT-HEILMAN CO.,
a Corporation,
Appellee,

vs.

NORMAN F. DOUGLAS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

STS 1.A. 817

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment for $483.00 rendered against him on the verdict of a jury.

The record discloses that plaintiff is engaged in the printing business and did printing which he claims was done for Campbell and other parties, for which he has not been paid. Defendant's position is that the work was not done for him and therefore he owes the plaintiff nothing.

On March 14, 1922, plaintiff brought suit against Donald F. Campbell, Frank Sprayer, G. Woodruff Perrett, Kenneth Leckett and William P. Altman, as copartners doing business as Food Concentrates, Inc. Afterward, by leave of court, he amended his pleadings so as to make Anthony R. Hester and G. R. Whitfield, Inc., a corporation, additional parties defendant, and all of the defendants were sued as copartners doing business as Food Concentrates, Inc. Perrett was not served with summons, and at the close of plaintiff's case, on motion of plaintiff, the suit was dismissed as to all the defendants except Campbell, Sprayer and Hester. Campbell alone filed an affidavit of merits denying liability; defendants Sprayer and Hester made no defense; they were defaulted and judgment was entered against them and Campbell. Sprayer and Hester testified for plaintiff.

It appears from the evidence that the defendant G. R. Whitfield, Inc., conducted a plant at 301 West Superior street, Chicago, where it was engaged in "dehydrating food specialties."

Defendant Campbell testified that he was an actuary for insurance companies, but that his principal work was in reference to pension funds for employees of the City of Chicago. He was interested as a stockholder in the defendant Whitfield corporation and at first owned about 35 per cent of the stock which later was increased to 90 per cent. Defendant Hester, called by plaintiff, testified that he was a public accountant and was connected with the defendant Food Concentrates, Inc., a proposed corporation, but that it was never incorporated, the proposition having fallen through. Hester was also employed by the Whitfield corporation, and the evidence of plaintiff was further to the effect that the Food Concentrates was to be incorporated to act as a sales organization for the Whitfield corporation.

Defendant Spreyer, called by plaintiff, testified that his occupation was "advertising counsel and production," and that he had dealings with Campbell, Hester and the Whitfield corporation in reference to the advertising material. The evidence also shows that he placed with plaintiff the order for the printing involved in this suit. Charles D. Heller, president of plaintiff Printing company, testified that he had the dealings with defendant Spreyer about November, 1931; that he did the printing according to directions furnished him by Spreyer, delivered the good, but had not been paid for them; that Spreyer told him that defendant Campbell was interested financially in the proposed Food Concentrates corporation; that he did not know defendant Campbell, had never talked to him at any time and had never sent Campbell a bill.

The substance of Campbell's testimony was that he had no connection with the proposed corporation, Food Concentrates; that he knew that defendants Spreyer and Hester were proposing to organize such a corporation to take over the Whitfield corporation, that he was pleased to have this done as he wanted to get his money out

Defendant Campbell testified that he was an attorney for Lantzman companies, but that his principal work was in reference to getting funds for employees of the City of Chicago. He was interested and stockholder in the defendant Whitfield corporation and at first owned about 33 per cent of the stock which later was increased to 50 per cent. Defendant Sterler, called by plaintiff, testified that he was a public accountant and was associated with the defendant Food Concentrates, Inc., a proposed corporation, but that it was never incorporated. The corporation having failed to qualify. Sterler was also employed by the Whitfield corporation, and the evidence of plaintiff was further to the effect that the Food Concentrates was to be incorporated to act as a sales organization for the Whitfield corporation.

Defendant Sprayer, called by plaintiff, testified that his occupation was "advertising counsel and promotion," and that he had dealings with Campbell, Sterler and the Whitfield corporation in reference to the advertising material. The evidence also shows that he joined with plaintiff the order for the printing involved in this suit. Charles E. Dreier, president of plaintiff Printing company, testified that he had the dealings with defendant Sprayer about November, 1931; that he did the printing according to directions furnished him by Sprayer, delivered the goods, but payment has been paid for them; that Sprayer told him that defendant Campbell was interested financially in the proposed food concentrates corporation; that he did not know defendant Campbell, had never talked to him at any time and had never seen Campbell a bill.

The substance of Campbell's testimony was that he had no connection with the proposed corporation, Food Concentrates; that he knew that defendants Sprayer and Sterler were proposing to organize such a corporation to take over the Whitfield corporation, that he was planned to have this done as he wanted to get his money out

of the Whitfield corporation; that he had nothing to do with ordering the printing in question and was in no way responsible for what had been done by plaintiff.

There is other evidence in the record, but since we have reached the view that there must be a new trial, we refrain from discussing it further here.

Defendant contends that plaintiff failed to prove the delivery of the printed matter; that there was no proof as to the price for which the work was to be done, and that plaintiff's books and ledger sheets were not admissible in evidence. None of these contentions can be sustained. We think the evidence was sufficient to warrant the jury in finding that the printing had been done and delivered, that the price was $823, and that the ledger sheet was properly admitted; but any doubt as to the price, as well as any other authentication of the books, can be obviated on a retrial. We do not think there was any error in the instructions complained of by defendant. The instruction was to the effect that if the jury found for the plaintiff, the amount of their verdict should be $821.08. There was no error in this respect because plaintiff was entitled to a verdict; there was no dispute as to the amount. Nor is there any merit in the contention that the amount of plaintiff's bill being more than $500 was subject to the defense of the Statute of Frauds which applies to sales of personal property. Since the printing was done and the material delivered, the statute is not applicable. Lorborbaum v. Levin, 228 Ill. App. 332.

We think defendant's contention that there was a misjoinder and a non-joinder of the parties defendant is equally without merit. This was a fourth class case in the Municipal court, and the Supreme court of this State in 1909, shortly after the Municipal court was created, held that a case of the fourth class was what the evidence made it and that written pleadings were not

of the Guilford corporation; that he had nothing to do with ordering the printing in question and was in no way responsible for what had been done by plaintiff.

There is plain evidence in the record, but also we have reached the view that there was no error, we refrain from discussing it further here.

Defendant contends that plaintiff failed to prove the delivery of the printed matter; that there was no proof as to the price for which the work was to be done, and that plaintiff's being the larger bidder, were not sufficient evidence. That at most additions can be sustained. To which the reviewer was entitled to warrant the jury in finding that the printing had been done and delivered, that the price was $825, and that the larger bidder was properly admitted; but any doubt as to the price, as well as any other authentication of the books, can be obviated on a retrial. We do not think there was any error in the instructions complained of by defendant. The instruction was to the effect that if the jury found for the plaintiff, the amount of their verdict should be $821.02. There was no error in this respect because plaintiff was entitled to a verdict; there was no dispute as to the amount. Nor is there any merit in the contention that the amount of plaintiff's bill being more than $200 was subject to the defense of the Statute of Frauds which applies to sales of personal property. Since the printing was done and the material delivered, the statute is not applicable. Patterson v. Lewis, 172 Ill. App. 324.

We think defendant's contention that there had a mistrial and a two-thirds of the jurors informed to specify their out verdict. This was a fourth class case in the municipal court, and the supreme court of this State in 1909, shortly after the Municipal court was created, held that a case of the fourth class was what the evidence made it and that written pleadings were not

required. Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. App. 311; in Bruner v. Grand Trunk Western R. R. Co., 319 Ill. 421, this rule was again affirmed, and we have in repeated decisions followed this rule laid down by the Supreme court.

The question of defendant's liability is open to great doubt. While plaintiff undoubtedly, in good faith, took the order, did the printing and delivered the material for which he has a judgment against Spreyer and Hester, who receipted for the material as it was delivered, yet the evidence is unsatisfactory so far as Campbell's liability is concerned. Whether we would reverse the judgment on the ground that it was against the manifest weight of the evidence, it is unnecessary to decide because we are of the opinion the court unduly examined the witnesses as they appeared on the witness stand. Of course a trial judge has the right to ask questions of witnesses, but we think the court participated too much in this respect, to the prejudice of defendant.

We are also of the opinion the court unduly limited defendant in the examination of the witnesses Lockett and Hansen. It was sought to elicit from them their version of certain conversations had between the parties to the suit. Plaintiff's witnesses had testified somewhat in detail to these conversations, but when defendants called witnesses the court was of the opinion they could only testify in rebuttal and that impeaching questions alone should be put to the witnesses. This was brought about by objection of counsel for plaintiffs. In this there was error. The witnesses should be permitted to tell all that was said and done at these meetings and not be limited to what might be termed strictly impeaching questions. These witnesses, as well as those called by plaintiff, had a right to give their side of what took place.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

reviews. Edwards v. C. I. & F. Ry. Co., 88 Ill. App. 631; in Jones v. Grand Lodge Tonkin I. O. O. F., 10 Ill. App. 1, the rule was again affirmed, and so long-recognized decisions followed this rule laid down by the Supreme court.

The question of defendant's liability is open to great doubt. While plaintiff undoubtedly, in good faith, took the order, did the printing and delivered the material for which he has a judgment against Sprague and Lewis, the evidence for the material as it was delivered, yet the evidence is unsatisfactory as for Campbell's liability is concerned. Whether we would reverse the judgment on the ground that it was against the manifest weight of the evidence, it is unnecessary to decide because we are of the opinion the court unduly examined the witnesses as they appeared on the witness stand. Of course a trial judge has the right to ask questions of witnesses, but we think the court participated too much in this respect, to the prejudice of defendant.

We are also of the opinion the court unduly limited defendant in the examination of the witnesses Lockett and Thomas. It was sought to elicit from them their version of certain conversations had between the parties to the suit. Plaintiff's witnesses had testified somewhat in detail to these conversations, but when defendants called witnesses the court was of the opinion they could only testify in rebuttal and that impeaching questions alone should be put to the witnesses. This was brought about by objection of counsel for plaintiff. In this there was error. The witnesses should be permitted to tell all that was said and done at those meetings and not be limited to what might be termed strictly impeaching questions. These witnesses, as well as those called by plaintiff, had a right to give their side of what took place.

The judgment of the municipal court of Cahokia is reversed and the cause remanded.

EVERETT, P. J., and McGlynn, J., concur.

36743

FRED A. ELLIS & CO., a Corporation,
Defendant in Error,

vs.

MRS. JOHN SMITH,
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT
OF COOK COUNTY.

103

272 I.A. 618

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant, Mrs. John Smith, to recover $471.18 which he claimed to be due him for installing a heating plant and doing other work in buildings belonging to defendant. The transcript of the justice of the peace states that when the case was called for trial defendant failed to appear and she was defaulted. Evidence was heard and judgment was there entered for the amount of plaintiff's claim. Defendant appealed to the Circuit court where there was a hearing before the court without a jury and a finding and judgment of $471.18 against defendant, and the record is now before us for review.

The record discloses that February 16, 1928, plaintiff, defendant, and defendant's husband, who apparently has since died, entered into a written contract whereby plaintiff agreed to install a heating plant for a store and apartment building to be erected in Winnetka, Ill., the contract price of which was $5,450. The contract contained the usual provision that money should be paid out only upon certificates signed by the architect. Attached to and made a part of the contract were specifications whereby the contractor guaranteed that when the heating plant was installed and in operation it would be capable of maintaining a temperature of 70 degrees Fahrenheit in the store and apartment building when the temperature outside was 10 degrees below zero.

Plaintiff offered evidence tending to show that he had completed the work and had done additional work aggregating $1188.08, making his total bill $6638.08, on which defendant had paid $6155.

[illegible]

[illegible] MILLER & CO., a Corporation,
Defendant in error,

vs.

[illegible] SMITH,
Plaintiff in error.

[illegible] Error to the Circuit Court
of [illegible].

[illegible] 3125 I.A. 618

Mr. Justice [illegible] MILVORD THE OPINION OF THE COURT.

Plaintiff brought suit against defendant, Mrs. Jane Smith, to recover $472.32 which he claimed to be due him for installing a heating plant and doing other work in building belonging to defendant. The statements of the justice of the peace showed that when the work was ready for brick veneering failed to answer and was then defaulted. Evidence was heard and judgment was then entered for the amount of plaintiff's claim. Defendant appealed to the Circuit Court where there was a jury trial before the court without a jury and a finding and judgment of $172.32 against defendant, and the record is now before us for review.

The record discloses that January 14, 1924, plaintiff, defendant, and defendant's husband, had conferred and agreed that there should be a written contract whereby plaintiff agreed to install a heating plant for a store and warehouse building to be erected in Vandyke, Ill., the contract price of which was $1,[illegible]. The contract contained the usual provision that money should be paid out only upon certificates issued by the architect. Attached to and made a part of the contract were specifications which had been interpreted by the architect. When the heating plant was installed and in operation it would be capable of maintaining a temperature of 70 degrees Fahrenheit in the store and warehouse building when the temperature outside was 10 degrees below zero.

Plaintiff offered evidence tending to show that he had completed the work and had done additional work amounting [illegible], making his total bill $[illegible], on which defendant had paid $[illegible].

These figures were testified to by plaintiff's secretary. This would leave a balance due of $483.08, while plaintiff testified the balance would be $417.83. Plaintiff testified that he had demanded payment a number of times and that at one time in the justice of the peace court he asked her when she would pay, and that she replied, "I owe it to you, but I am going to give you as much trouble as I can before you collect it." This was specifically denied by defendant. Defendant also testified that there was one apartment in the building that she could not heat; that she complained repeatedly to plaintiff but that he did nothing about it and made no effort to see what the trouble was; that it was impossible to heat that apartment to 70 degrees Fahrenheit; she offered to produce two other witnesses who were in court and who would testify that it was impossible to raise the temperature in one of the apartments to more than 68 degrees Fahrenheit. There was no contradiction or dispute on this point; no evidence of any kind was offered to contradict the testimony of defendant and her two witnesses. Obviously, since the specifications which are made a part of the contract between the parties provided that the plant when installed and in operation would maintain a temperature of 70 degrees Fahrenheit when the temperature outside was 10 degrees below zero, and all the evidence showing to the contrary, plaintiff had not carried out his contract and was not entitled to a judgment for the balance claimed on the contract.

In justifying the judgment of the trial court, counsel for plaintiff points out that the learned trial Judge, in deciding the case said in substance that if the plant did not heat the building to 70 degrees, it was defendant's duty to go out and get a plumber and have the defect remedied and then sue plaintiff for the amount of the bill. Obviously such is not the law. Before plaintiff was entitled to recover he must have complied substantially with the

These figures were furnished to by plaintiff's accountant. This would leave a balance due of $887.00, while plaintiff testified the balance would be $817.00. Plaintiff testified that he had accepted payments a number of times and when he was also in the presence of the peace court he asked her when she would pay, and that she replied, "I owe it to you, but I am going to give you as much trouble as I can before you collect it." This was substantially denied by defendant. Defendant also testified that there was no agreement in the building that she could not sell; that she complained especially to plaintiff but that he did nothing about it and made no effort to see what the trouble was; that it was impossible to live that condition in MC Agreys Subdivision; she stated in spite of the other witnesses who were in court she was the only person who was inconsiderate to which the complainant in one of the questions to more than 20 inquiries [illegible]. There was no contradiction or charge on this point; no evidence of any kind was offered to contradict the testimony of defendant and her two witnesses. Evidently, since the specifications which are made a part of the contract between the parties provided that the plans were limited and in question will include a [illegible] of MC Agreys Subdivision when the temperature outside was 10 degrees below zero, and all the evidence showing to the contrary, plaintiff did not carried out his contract and was not entitled to a judgment for the balance claimed on the contract.

In justifying the judgment of the trial court, counsel for plaintiff points out that the learned trial judge, in handing the bench said in substance that if the plaintiff did not heat the building to 70 degrees, it was defendant's duty to do so and get a plumber and have the latest installed and then sue plaintiff for the amount of the bill. Obviously such is not the law. Before plaintiff can maintain he must have complied substantially with the

provisions of his contract, and under the evidence in this record, which is not contradicted, the judgment cannot stand.

There is no merit in defendant's contention that the judgment should be reversed because there was no proof that an architect's certificate had been obtained, as the contract provided, before anything would be due. The evidence is undisputed that defendant from time to time paid sums aggregating $6155 and in this state of the record it must be presumed that certificates were issued or that the issuance of them was waived.

Since the undisputed evidence shows that plaintiff failed to carry out the provisions of his contract, as above stated, he was not entitled to a judgment for the balance he claims is due under the contract. But the undisputed evidence is that in addition to the work covered by the contract plaintiff installed a valve for $55, took out clinkers from the boiler at a charge of $5, and installed a radiator in 1930 for $74.08, making a total of $134.08. To this part of plaintiff's claim there was no defense; and since defendant did not endeavor to recoup or enforce any counter claim she might have on account of the damages she claimed to have sustained by reason of her contention that the plant as installed did not comply with the terms of the contract in that it failed to heat one apartment, plaintiff was entitled to recover the $134.08.

For the reason stated the judgment of the Circuit court of Cook county is reversed and judgment entered in this court in plaintiff's favor and against defendant for $134.08. Plaintiff will be required to pay two-thirds and defendant one-third of the Appellate court costs.

JUDGMENT REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

Matchett, P. J., and McSurely, J., concur.

provisions of his contract, and under the evidence in this record, which is not contradicted, the judgment cannot stand.

There is no merit in defendant's contention that the judgment should be reversed because there was no proof that an equitable's certificate had been obtained, or that contract invalid, before anything would be done. The evidence is undisputed that defendant from time to time paid some supervising (?) and in this case of the record it must be presumed that certificates were issued or that the issuance of them was waived.

Since the undisputed evidence shows that plaintiff failed to carry out the provisions of his contract, as above stated, he was not entitled to a judgment for the balance or claim in the under the contract. But the undisputed evidence is that in addition to the work covered by the contract plaintiff installed a valve for $25, but not claimed from the value as a charge of it, and furnished a radiator in 1906 for $74.00, making a total of $124.00. In this part of plaintiff's claim there was no dispute; and since defendant did not demurrer to recover or motion for counter claim the right here on account of the damage the claimed in more considered by reason of her counterclaim that his plant is insufficient for the purpose, although the evidence of the contract is that it ought to heat the building, plaintiff was entitled to recover the $124.00.

For the reason stated the judgment of the circuit court of Cook county is reversed and judgment entered in this court in plaintiff's favor and against defendant for $124.00. Plaintiff will be required to pay the costs and defendant cross-claim of the appellate court herein.

Reversed and judgment.

Mulkey, P. J., and Scanlan, J., concur.

36753

NICHOLAS WALLANO,
Defendant in Error,

vs.

DOROTHY WALLANO,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

104

272 I.A. 618

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 26, 1930, Nicholas Wallano filed his bill against the defendant, his wife, praying for a decree of divorce on the ground that defendant had been guilty of extreme and repeated cruelty. Defendant answered, denying the acts of cruelty charged and denying that complainant had treated her kindly, but on the contrary averred that he had been guilty of extreme and repeated cruelty toward her. She afterward filed a cross bill charging him with extreme and repeated cruelty and prayed for a decree of separate maintenance. He denied the charges made in the cross bill. The case was heard before the chancellor and a decree entered in favor of complainant and against defendant on her cross bill and she appeals.

The record discloses that the parties were married on June 29, 1930, and separated August 27, 1930, or a few days before; that after they were married they lived with complainant's father and mother and other members of the family; that there was considerable quarreling between complainant and defendant, defendant taking the position that the trouble was brought about by complainant's mother, and defendant requested complainant to establish a home of their own, but that he refused to do so.

Complainant in his bill filed August 26, 1930, charged that he and the defendant lived together as husband and wife until August 15th, when she refused to live with him; he charges defendant with two acts of cruelty which he alleges occurred on July 15, 1930, and

[illegible]

[illegible] Informal in Chancery.

vs.

[illegible] WILLARD.

Formality in Divorce.

[illegible]

[illegible] Judge of the County Court.

[illegible]

[illegible]

[illegible] Bill filed on the ground of adultery.

[illegible] 19, 1907, Elmerlin Fielding filed his bill against the defendant, his wife, praying for a decree of divorce on the ground that defendant had been guilty of adultery and opprobrious insanity. Defendant answered, denying the acts of adultery charged and averring that complainant had treated her kindly, but on the contrary averred that he had been guilty of cruelty and repeated adultery toward her. The chancery filed a cross bill charging his wife with repeated adultery and praying for a decree of absolute nullification. To denial the allegations made in the cross bill. The case was heard before the chancellor and a decree entered in favor of complainant and against defendant on her cross bill and the appeals.

The record discloses that the parties were married on June 22, 1898, and separated August 17, 1906. At a few days before that they were married they lived with complainant's father and mother and other members of the family. Shortly after the marriage complainant's mother died, and defendant taking the position that he treated her kindly and by complainant's mother, and defendant repeatedly complained to complainant's father of their treatment, but that he refused to do so.

Testimony in the bill filed appears to, then, charged that he and the defendant lived together at Goshen and she until April 1906, when the parties to the bill left to separate defendant with the acts of adultery which he charges occurred on July 12, 1906, and

on August 14, 1930.

September 3rd defendant answered, denying that complainant had treated her affectionately since their marriage and denied any acts of cruelty on her part; and specifically denied the two acts of cruelty charged against her.

September 16, 1930, defendant filed her cross bill alleging that they lived together until August 27, 1930, and charges complainant with cruelty so that she was compelled to leave him at that time. She charged specific acts of cruelty on July 23, August 9, 14, and 26, 1930; that on August 24th complainant refused to admit her to their home and she was compelled to call the police to gain entrance into her home; from which last mentioned date complainant refused to live with her or to provide her with any food or maintenance; that on August 27th she was compelled to leave.

September 26rd complainant answered the cross bill, denying the acts of cruelty charged against him and denying that they lived together until August 27th, but averred that they separated on August 25th.

March 12, 1931, complainant filed his amended bill, in which he alleged the marriage on June 22, 1930, and for the first time alleged that the separation took place August 27, 1930, and charged defendant with acts of cruelty on July 5, 15, 16 and 26, and on August 14, 1930.

March 17th defendant filed her answer, denying specifically the acts of cruelty charged against her, admits the marriage on June 22, 1930, and the separation on August 27, 1930.

June 16th, 1931, complainant filed his supplemental bill in which he again alleges that the separation took place August 27, 1930, and charges defendant with acts of cruelty which he alleges occurred on July 5, 15, 16, 23, and August 14, 1930, and May 15,1931.

on August 12, 1920.

September 3rd defendant answered, denying that complainant had treated her cruelly since their marriage and denied any acts of cruelty on her part; and cross-libelled denying the charge of wrongly charged against her.

September 22, 1920, defendant filed her motion for alimony, saying that they lived together until August 27, 1920, and charges complainant with cruelty so that she was compelled to leave him on that date. She charged complainant with cruelty on July 31, August 7, 14, and 26, in that he began that morning by telling her she is crazy and to leave home and that she complained to him that he was a bad man to make witness leave her home; that he called her miserable and claimed she was ashamed to live with him or to provide for her; that he struck her on Sunday; that on August 26th she was compelled to leave.

Complainant filed their answer the same day, denying the acts of cruelty charged against him and charging that they lived together until August 27th, but without her being compelled to leave.

March 14, 1921, complainant filed her amended bill, in which he alleged the marriage on June 27, 1918, and for the first time alleged that the separation was since August 27, 1920, and charged defendant with acts of cruelty on July 9, 17, 24 and 31, and on August 14, 1920.

Later she filed her answer, denying generally the acts of cruelty charged against her, which she averred on June 27, 1920, was the separation on August 27, 1920.

June 1st, 1921, complainant filed her amended bill to which he again alleged that the separation was since August 27, 1920, and charge defendant with acts of cruelty on July 9, 17, 24, 31, August 14, 26, 27, 28, and August 31, 1920, and July 19,1921.

Defendant answered this supplemental bill, denying all acts of cruelty charged against her.

The case was heard before the chancellor and the decree was entered February 11, 1932, in which the court specifically finds defendant guilty of the acts of cruelty charged against her on July 5, 15, 16, 28, and August 14, 1930, and May 16, 1931; finds that defendant has not sustained her charge of cruelty as alleged in her cross bill, but there is no finding in the decree as to the date when the separation took place, and a decree of divorce was entered in favor of complainant and dismissing the cross bill for want of equity.

The evidence on most of the charges of cruelty made by complainant and by defendant in her cross bill was in sharp conflict, and there is considerable evidence in the record tending to sustain defendant's and cross-complainant's contention that the trouble arose on account of complainant's acts of cruelty - that complainant was guilty of extreme and repeated cruelty toward defendant; and were we to pass upon the question as to which one was guilty of the acts of cruelty from the printed page alone, we would be inclined to agree with defendant's contention. But the chancellor had the witnesses before him and was in a much better position to determine the truth of the evidence than are we in a court of review. He found in favor of complainant and against defendant, and unless we are able to say that the finding is against the manifest weight of the evidence, we are not warranted, under the law, in disturbing the decree; and upon a careful consideration of all the evidence in the record, in view of the fact that the chancellor saw and heard the witnesses, we are unable to say that his finding is against the manifest weight of the evidence.

Defendant contends that complainant's bill was prematurely filed on August 26, 1930, while the allegations in the supplemental

Defendant numerous this multiplication bill, implying not only of directly contrary against but.

The case was heard before the commissioner and he issued the opinion February 11, 1896, in which he gives considerably their determined guilty of the acts of unfairly charged against the defendant July 9, 11, 14, 20, and August 21, 1895, and Jan 30, 1896; finds that defendant has not sustained her charge of unfairness or cruelty in the bar room bill, but claims it on finding in the bedroom on the ground that the plaintiffs were guilty, and a number of witnesses who adopted it from of complaints and disturbing the peace bill was made of cruelty.

The evidence on both of the charges of cruelty made by some witnesses and by defendant in her cross bill was in sharp conflict, and there is contradictory evidence in the record concerning the matters defendant's and plaintiffs's testimony that the trouble came on account of complainant's acts of cruelty - that complainant was guilty of actions and required cruelty towards defendant, and then to pass upon the question as to which one the guilty of the acts of cruelty from the printed page alone, we would be inclined to agree with defendant's contention. But the commissioner and the chancellor before him had the a much better position to determine the truth of the witnesses than we can in a court of review. We find in first of complainant's testimony, and although we do not doubt that the fighting in question is against defendant's wishes or at least that the fighting is against the conflict which of the evidence, we are not satisfied, under the law, in disturbing the decree; and upon a careful consideration of all the evidence in the record, in view of the fact that the chancellor saw and heard the witnesses, we are unable to say that the fighting is against the conflicting which of the witnesses.

Defendant contends that complainant's bill was prematurely filed on August 22, 1895, while the allegations in the multiplicated

bill and cross bill both over that the separation took place on the next day, August 27th. As above stated, there is no finding when the separation took place, but even if we assume that it was on August 27th, we are not warranted in saying that the decree should be reversed because the decree finds the defendant guilty of several acts of cruelty that occurred prior to that time. Moreover, we think the evidence fails to show that they were condoned.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Bill and Anna Bill said that the negotiation was going on the next day, August 27th. As there stand, Anna is in limbo with the negotiation long gone, but even if we change her, it was on August 27th, we are not convinced in saying that the Jones should be vacated because the Jones flunk the Estimation policy at August made at exactly that moment prior to that time. Therefore, we hold the wellmore Bills to have that they had validly.

The decree of the District Court of Jack County is affirmed.

CONRAD WILLIAMS.

Dissenting, T. J., and Hickman, J., concur.

36766

HARRIET K. DOLL, ADOLPH DOLL, J. FRANK SMITH and JOHN H. RYMER, Copartners, Doing Business as NORM CO.,
Plaintiffs in Error,

vs.

EGGERS FURNITURE CO., a Corporation,
Defendant in Error.

105 H

ERROR TO MUNICIPAL COURT OF CHICAGO.

272 I.A. 618[3]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against defendant to recover $312.50 claimed to be due them under the terms of a written contract dated January 31, 1930, entered into by the parties. The contract provided that it should continue for a period of one year and a further period of one year, "unless at least sixty days prior to its expiration Norm Company (plaintiffs) shall receive from (defendant) by registered mail notice of (defendant's) intention to terminate the contract at the end of the contract year."

Defendant filed an affidavit of merits setting up that it had paid all that it owed plaintiffs under the terms of the contract and that November 25, 1930, it sent to plaintiffs at their address in New York City, a notice to cancel the contract at the termination of the contract January 31, 1931. There was a jury trial and a verdict and judgment in defendant's favor and plaintiffs appeal.

The evidence heard on the trial is not preserved in the record.

Plaintiffs contend that since the contract provided that it could be terminated by defendant giving plaintiffs sixty days notice by registered mail of defendant's intention to terminate the contract, it could not be terminated in any other manner. And since defendant's affidavit of merits merely set up that defendant had sent a notice of cancellation to plaintiffs, it stated no defense because it failed to state that the notice was sent plaintiffs by registered mail, and

[illegible]

TIMOTHY W. DOLL, ARTHUR HALL, F. [illegible] SMITH and [illegible] C. [illegible], copartners, doing business as [illegible] CO.,
Plaintiffs in Error,

vs.

[illegible] FURNITURE CO., a Corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

272 I.A. 618

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against defendant to recover $[illegible] claimed to be due them under the terms of a written contract dated January [illegible], 19[illegible], entered into by the parties. The contract provided that it should continue for a period of one year and a further period of one year, "unless at least sixty days prior to its expiration Note Company (plaintiffs) shall receive from (defendant) by registered mail notice of (defendant's) intention to terminate the contract at the end of the contract year."

Defendant filed an affidavit of merits setting up that it had paid all that it owed plaintiffs under the terms of the contract and that November [illegible], 19[illegible], it sent to plaintiffs at their address in New York City, a notice to cancel the contract at the termination of the contract January [illegible], 19[illegible]. There was a jury trial and a verdict and judgment in defendant's favor and plaintiffs appeal.

The evidence heard on the trial is not preserved in the record.

Plaintiffs contend that since the contract provided that it could be terminated by defendant giving plaintiffs sixty days notice by registered mail of defendant's intention to terminate the contract, it could not be terminated in any other manner. And since defendant's affidavit of merits merely set up that defendant had sent a notice of cancellation to plaintiffs, it stated no defense because it failed to state that the notice was sent plaintiffs by registered mail, and

that it was received by plaintiffs. The argument seems to be that since the contract provided how it might be terminated, the contract could not be terminated in any other manner. Obviously, this defense is entirely without merit. There is no reason why both parties could not agree to terminate it in any manner which they saw fit; and since the record discloses that the case was heard upon the evidence produced and passed upon by the jury, we must presume that its finding was justified by the evidence. Moreover, since the evidence is not before us we are unable to say that the case turned on the question whether the contract had been cancelled at all, or in a proper manner. We often find that cases come to this court where evidence is offered without objection which would not be admissible under the pleadings had objection been made, and where the case was decided on the evidence adduced (especially in cases of the 4th class in the Municipal court, such as is the case before us). When this appears neither party will be heard to say that the evidence submitted was not within the pleadings. So in the instant case we have no way of determining what the evidence disclosed, but we must presume everything in favor of the verdict of the jury, confirmed as it is by the judgment of the trial court.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

that it was reached by plausibility. The argument seems to be that since the particular supposed case is which be hearsaying, the question could not be terminated in any other manner. Obviously, this defense is entirely without merit. There is no reason why such matters need serve to terminate it in any manner which they are (if) not since the record discloses that the case was tried upon the pleadings and passed upon by the jury, moreover presume that the finding was justified by the evidence. Moreover, since the evidence is not before us we are unable to say that our case turned on the question whether the contract had been consummated or not, or in a proper manner, to which that case came to this court where evidence is filed without objection rules would not be applicable unless the findings had objection been made, and where the case was tried on the evidence adduced (essentially in essence of the law claim in the Municipal court, such as is the case before us). Even this appellate policy will be found to say that the ultimate conclusion was not within the pleadings. So in the instant case no have no way of determining what the evidence discloses, but we must presume everything in favor of the verdict of the jury, sufficient as it is by the judment of the trial court.

The Judgment of the Municipal court of Illinois is affirmed.

Robert Lytton

Sabinski, P. J., and Kennedy, J., concur.

36775

STANDARD INSURANCE COMPANY OF NEW YORK, a Corporation,
Appellant,

vs.

AMERICAN FIRE & MARINE INSURANCE COMPANY, a Corporation, and AMERICAN INDEMNITY COMPANY, a Corporation,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 618

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 21, 1932, the Meiji Fire Insurance Company, a corporation, brought suit against the American Fire and Marine Insurance Company, a corporation, and the American Indemnity Company, a corporation, to recover $618.85 claimed to be the balance due of an unearned premium for $1000 on a policy of insurance, and which was later cancelled by agreement. Afterward the Standard Insurance Company of New York, a corporation, was made a party plaintiff, and on the trial the Meiji Fire Insurance Company was dropped as one of the plaintiffs. There was a jury trial and a verdict and judgment in defendants' favor, and plaintiff appeals.

The record discloses that Hodgkinson & Durfee, a corporation, were general insurance agents with offices in Chicago, and represented a number of companies, including the plaintiff, the Standard Insurance Company of New York, and the defendant Insurance companies, and as general agents issued policies of insurance in several companies. April 1, 1931, the Standard Insurance Company obtained a policy for $100,000, issued by the defendant American Fire and Marine Insurance Company, through the general agent, Hodgkinson & Durfee, corporation. The premium of this policy was $1000, and on May 1, 1931, Hodgkinson & Durfee sent a statement, as was its custom, to plaintiff, Standard Insurance Company of New York, showing the issuance of this policy and premium due of $1000. On the statement the Standard Insurance Co. was given a credit of

$457.41 for "returned premium" on another policy issued April 1, 1931, through Hodgkinson & Durfee Co. to the Standard Co. The $457.41 was deducted from the $1000, leaving a balance of $542.59, from which there was a further deduction of $135.65, commission due the Standard Company, leaving a balance due from the Standard Company to Hodgkinson & Durfee Co. of $406.94. June 1, 1931, the Standard Company sent its check for the $406.94 to Hodgkinson & Durfee Co., and it was paid in the regular order of business. Afterward, about July 1, 1931, the $100,000 policy was by mutual agreement cancelled as of the date of its issuance, so that it is conceded that the Standard Co. would be entitled to have the $1000 premium returned to it. Plaintiff sues to recover this $1000 less certain admitted deductions which leave a balance of $818.35.

The defense was that plaintiff had been paid the $1000 in full. It appears from the evidence that the Hodgkinson & Durfee Co. represented both plaintiff and defendants in issuing and obtaining insurance policies and had a running account with plaintiff; that at the end of each month statements would be rendered for any balance due on the account, which were paid by Hodgkinson & Durfee or by plaintiff, as the case might be. Hodgkinson & Durfee got into financial difficulties and went out of business about May, 1932.

Plaintiff's contention is that the verdict and judgment is against the manifest weight of the evidence. Barton F. Walker, called by plaintiff, testified that he had been employed by Hodgkinson & Durfee as office manager and was a director of that corporation; that the policy in question had been issued and the premium paid by the Standard Company; that later the policy was cancelled, and the premium had not been returned to the Standard Co. On cross examination he further testified that each month a statement was sent by Hodgkinson & Durfee to the Standard Company in which a number of items were set forth, including the $1000

$487.41 for "returned premium" on another policy issued April 1, 1921, through Hodgkinson & Burtee Co. to the Standard Co. The $487.41 was deducted from the $3000, leaving a balance of $2512.59, from which there was a further deduction of $125.59, commission due the standard Company, leaving a balance due from the Standard Company to Hodgkinson & Burtee Co. of $2386.94. June 1, 1921, the Standard Company sent its check for the $2386.94 to Hodgkinson & Burtee Co., and it was paid in the regular order of business.

Afterward, about July 1, 1921, the $3000.00 policy was by mutual agreement cancelled as of the date of its issuance, so that it is admitted that the Standard Co. would be entitled to have the $2386 premium returned to it. Plaintiff sues to recover this $2386 from certain admitted deductions which leave a balance of $814.47.

The defense was that plaintiff had been paid the $2386 in full. It appears from the evidence that the Hodgkinson & Burtee Co. represented both plaintiff and defendants in issuing and effecting the insurance policies and that a running account with plaintiff; that at the end of each month statements would be rendered for any balance due on the accounts, which were paid by Hodgkinson & Burtee or by plaintiff, as the case might be. Hodgkinson & Burtee got into financial difficulties and went out of business about May,1922.

Plaintiff's contention is that the verdict and judgment is against the manifest weight of the evidence. Burton v. Walker, called by plaintiff, testified that he had been employed by Hodgkinson & Burtee as office manager and was a director of that corporation; that the policy in question had been issued and the premium paid by the Standard Company; that later the policy was cancelled, and the premium had not been returned by the Standard Co. On cross examination he further testified that each month a statement was sent by Hodgkinson & Burtee to the Standard Company in which a number of items were set forth, including the $2386

premium and credits against this item; that there was a gross return premium of $457.41, and that plaintiff was credited with this item. Counsel for defendants, in his brief, in referring to this testimony says Walker testified that plaintiff was credited with the "gross return premium," and from this concludes that the account was squared. This argument is unsound because it is obvious that the $457.41 "return premium" was a credit given the Standard Co. by Hodgkinson & Durfee Co. in its statement of May 8, two months before the policy in question was issued. The $457.41 obviously was not a part of the $1,000 premium, but the statement expressly shows that it was a "return premium" on another policy issued April 1, 1931.

Henry Hofmeister, also called by plaintiff, testified that he was employed by the Standard Co. as assistant manager, that he knew about the policy in question, and testified that after the cancellation of the policy the premium was not returned to plaintiff. But on cross examination, in response to a question put to him, whether he knew that the premium had not been returned, he answered, "No, not without the books."

J. W. Frejd, also called by plaintiff, testified that he was an accountant and cashier for the Standard Co.; that he kept the books of the company; that it dealt with the Hodgkinson & Durfee Co.; that the books showed the American Fire & Marine Co. owed the Standard Insurance Co. $618.85 on account of the $1000 premium, and that it did not deal directly with the defendant but through Hodgkinson & Durfee Co. The exhibit testified to by this witness showed the account between plaintiff and the American Fire & Marine Insurance Co.; it does not purport to show plaintiff's account with the Hodgkinson & Durfee Co. This was all the evidence offered by plaintiff on the question.

premium and credits against this item; that there was a gross premium of $427.41, and that plaintiff was credited with this item. Counsel for defendants, in his brief, in referring to this testimony says Walker testified that plaintiff was credited with the "gross return premium," and from this conclusion that the account was squared. This argument is unsound because it is obvious that the $427.41 "return premium" was a credit upon the Standard Co. by Hodgkinson & Burles Co. in its statement of May 8, two months before the policy in question was issued. The $427.41 obviously was not a part of the $1,000 premium, but the statement unmistakably shows that it was a "return premium" on another policy issued April 1, 1913.

Henry McClelland, also called by plaintiff, testified that he was employed by the Standard Co. as assistant manager, that he knew about the policy in question, and testified that after the cancellation of the policy the premium was not returned to plaintiff. But on cross examination, in response to a question put to him, whether he knew that the premium had not been returned, he answered, "No, not without the books."

J. W. Pratt, also called by plaintiff, testified that he was an accountant and auditor for the Standard Co.; that he kept the books of the company; that it dealt with the Hodgkinson & Burles Co.; that the books showed the American Fire & Marine Co. owed the Standard Insurance Co. $413.83 on account of the $1000 premium, and that it did not deal directly with the defendant but through Hodgkinson & Burles Co. The exhibit testified to by this witness showed the account between plaintiff and the American Fire & Marine Insurance Co.; it does not purport to show plaintiff's account with the Hodgkinson & Burles Co. This was all the evidence offered by plaintiff on the question.

Defendant called John A. Bottone, employed as an accountant by Hodgkinson & Durfee Co. He testified that he kept the books of the Hodgkinson & Durfee Co., and that in December, 1931, plaintiff was given a credit of $1000 for the return premium on the policy in question; that at that time plaintiff owed the Hodgkinson & Durfee Co. about $1,300 and was credited the $1000 against this indebtedness. If the testimony of this witness is taken as true, then plaintiff has been paid all that it claims in this suit. The most that can be said on plaintiff's side of the case on this question, is that the question was one for the jury; and we are clear we would not be warranted in disturbing the verdict of the jury on the ground that it is against the manifest weight of the evidence.

The Hodgkinson & Durfee Co. was the agent of both parties, and the jury having found in effect that plaintiff had been paid in full, and since we are of opinion that we would not, under the law, be warranted in disturbing the verdict, the judgment of the Municipal court of Chicago must be affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Defendant relied upon G. Statutes, negligence is no assumption by Hodgkinson v Durfee 1a. To justify that he must be bound the finding of the Hodgkinson v Durfee 1a., not that in December, 1911, plaintiff was given a credit of $2000 for the events arrived on the policy in question; that at that time plaintiff owed the Hodgkinson v Durfee 1a, about $1,000 and was entitled the $1000 against this indebtedness. If the testimony of this witness is taken as true, then plaintiff has been paid all that it claims in this suit the most that can be said on plaintiff's side of the case on this question, is that the question was one for the jury; and we are clear we could not be warranted in disturbing the verdict of the jury on the ground that it is against the manifest weight of the evidence.

The Hodgkinson v Durfee 1a, was the agent of both parties, and the jury having found in effect that plaintiff had been paid in full, and there is no of opinion that we would not, under the law, be warranted in disturbing the verdict, the judgment of the Municipal court of Chicago must be affirmed.

Judgment affirmed.

Mr. Justice, C. J., and Mr. Justice, J., concur.

36797

GEORGE L. WILKINSON,
Appellant,

vs.

ETHEL LOUISE SWANSON, Administratrix of the Estate of CHARLES PEGLER, Deceased,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

107

272 I.A. 618

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 27, 1932, plaintiff brought an action against Charles Pegler to recover damages claimed to have been sustained through the negligence of defendant, causing a collision between plaintiff's and defendant's automobiles, as a result of which plaintiff's automobile was damaged. The damages were laid at $900.

Pegler filed an affidavit of merits denying negligence on his part but averring that the collision occurred through the negligence of plaintiff's chauffeur who was driving plaintiff's car at the time of the collision. Afterward, December 22, 1932, on motion of plaintiff, an order was entered substituting Ethel Louise Swanson as administratrix of the estate of Charles Pegler, deceased, as defendant, and an amended statement of claim was filed. There was a jury trial, a verdict and judgment in defendant's favor, and plaintiff appeals.

In his amended statement of claim plaintiff alleged that the collision between the automobiles occurred January 29, 1932; that his car was being driven south in Forest avenue in Evanston and Pegler's car east on Keeney street, and in his amended statement of claim the same allegations were made. At the close of plaintiff's evidence he was allowed to amend his amended statement of claim by alleging that Pegler's car was being driven west on Keeney street.

The evidence shows that about 12:30 p. m., on February 5, 1932, plaintiff's Lincoln automobile was being driven south by

[illegible]

[illegible]

[illegible]

his chauffeur; that Frances Dodd was riding in the back seat; that they were travelling at a speed of from 23 to 25 miles an hour, and at that time Charles Pegler was driving his Lincoln automobile west in Keeney street at about 20 miles an hour. The streets intersect at right angles.

John Gates, plaintiff's chauffeur, testified that the day was cold, the snow packed hard and the pavement quite slippery; that he was driving about 23 miles an hour; that there was a "Slow" sign on Keeney street but none on Forest avenue; that when he was about 30 feet north of the north crosswalk of Keeney street he saw Pegler's car, which was just then entering the intersection at the east crosswalk; that Pegler, who was driving the car, was looking straight ahead; that as Gates was approaching the intersection he looked to the east; that there was a house at the northeast corner of the intersection and when he was near the intersection he could see about 75 to 100 feet to the east; that when he was about 30 feet north of the north crosswalk and the Pegler car was entering the intersection, he immediately applied his brake, but the car skidded right into Pegler's car, striking it about the middle of the north or righthand side, and the cars were pushed around toward the southwest corner of the intersection. He further testified that he was driving near the middle of the pavement in Forest avenue, which is 27 feet wide; that Keeney street was about the same width and Pegler was driving a little to the north of the center of that street. On cross examination he testified, "Snow and ice covered the whole pavement;" that when the collision occurred the front wheels of the Pegler car were about as far west as the west curb line of Forest avenue.

Frances Dodd, who was riding in the back seat of plaintiff's car, testified that she had been riding and driving automobiles for

his chauffeur; that Frances Dodd was riding in the back seat; that they were travelling at a speed of from 25 to 30 miles an hour, and at that time Doctor Taylor was driving his friends automobile upon the Kenney street at about 35 miles an hour. The defendants interposed at trial pleas.

Upon these, plaintiff's counsel, insisting that the car was safe, his show proved that not his personal safe driving; that he was driving about 25 miles an hour; that there was a flaw' edge on Kenney street but some in front of the house, that when in was about 25 feet north of the north intersection of Kenney street in the Taylor's car, which was just then entering the intersection at the west crossing; that Taylor, who was driving the car, was looking straight ahead; that as soon as he approaching the intersection he looked to the east; that there was a house at the northeast quarter of the intersection and when in the act the intersection he could see about 75 to 100 feet in the east; that when he was about 25 feet north of the north crossing and the Taylor car was entering the intersection, he immediately veered his brake, as the car skidded plus into Taylor's car, striking it some six-eighth of the north or eighteen side, and the back tire rolled around inside the southwest corner of the intersection. Mr Taylor testified that he was driving near the middle of the street, around 15 or 17 feet wide; that Kenney street was about 16 feet wide; and Taylor was driving a little to the north of the center of that street. In order contradicting he testified, "Now, I was moving the whole purpose;" that when the collision occurred the front wheels of the Taylor car were about as far west as the west curb line of Kenney avenue.

Frances Dodd, who was riding in the back seat of plaintiff's car, testified that her had been riding and driving automobiles for

a number of years and that plaintiff's car was going from 23 to 24 but not more than 25 miles an hour; that she saw the Pegler car just before the impact; that it was about the middle of Forest avenue.

This is all the evidence in the record as to how the accident occurred. Plaintiff called other witnesses with a view of proving the extent of his damages. The defendant called no witnesses and coulsel explain in their brief that there was no witness who saw the accident except Pegler, and that he has since died.

Plaintiff contends that the court erred in refusing his motion for a directed verdict on the question of liability, the argument being that since the only evidence offered was that offered by himself, none being offered by defendant, he made out a prima facie case. We think this contention is unsound because if, from the testimony of the two occurrence witnesses two different inferences might legitimately be drawn, it was for the jury to draw the inferences. We think it obvious that whether plaintiff's chauffeur was in the exercise of due care for his own safety, and whether Pegler was guilty of negligence which proximately resulted in the collision, were proper questions for the jury to determine. It cannot be said, as a matter of law, that plaintiff's chauffeur was guilty of no negligence when the evidence shows that he was driving from 23 to 25 miles an hour on a very slippery pavement, and that he was about 30 feet north of the north crosswalk when he saw Pegler's car just entering the intersection.

Complaint is also made that the court erred in sustaining objections to the argument to the jury made by counsel for plaintiff. Plaintiff's counsel said in his argument that defendant's counsel had stated there was nothing requiring Pegler to stop before entering the street intersection, and continuing said: "The court will instruct you that it is the duty of a person operating an automobile not only to slow down but to stop if necessary."

a matter of years and that plaintiff's car was going from 22 to 32 not more than 22 miles an hour; that she saw the Pegler car just before the impact; that it was about the middle of June around.

This is all the evidence in the record as to how the accident occurred. Plaintiff called other witnesses with a view of proving the extent of his damages. The defendant called no witnesses and content contending in their brief that there was no liquor sold the accident except Pegler, and that he was sober.

Plaintiff contends that the court erred in refusing his motion for a directed verdict on the question of liability, the argument being that since the only evidence offered was that offered by plaintiff, none being offered by defendant, he made out a prima facie case. We think this contention is unsound because it, from the testimony of the two surviving witnesses the different statements might logically be drawn, it was for the jury to draw the inference. We think it obvious that whether plaintiff's contributory was in the exercise of due care for his own safety, and whether Pegler was guilty of negligence which proximately resulted in the collision, were proper questions for the jury to determine. It cannot be said, as a matter of law, that plaintiff's contributory was guilty of no negligence when the evidence shows that he was driving from 22 to 32 miles an hour on a very slippery pavement, and that he was about 30 feet north of the north crosswalk when he saw Pegler's car just entering the intersection.

Complaint is also made that the court erred in sustaining objections to the argument to the jury made by counsel for plaintiff. Plaintiff's counsel said in his argument that defendant's counsel had stated there was nothing regular to stop before entering the street intersection, and continuing said: "The court will instruct you that it is the duty of a person operating an automobile not only to slow down but to stop if necessary."

Defendant's counsel objected to this, stating, "There is no evidence that this was a stop street." Counsel for plaintiff then said, "If the Court please, there are numerous decisions to the effect that it is the duty of anybody operating an automobile to slow down or even stop if necessary." Objections are made and sustained to this. It is argued, as we understand it, that this ruling was erroneous for the reason that the statute gives the right of way to the car approaching from the right, and that in the instant case plaintiff's car had the right of way. We think this argument is inapt. The objection to the argument was not based on the right of way doctrine, but on the ground that there was no evidence in the record showing that Forest avenue was a "stop street." Moreover, the court's instructions were oral but are not in the record, and in this state of the record we must presume that the instructions were in accordance with the law with reference to the rule as to which car had the right of way, under the circumstances disclosed.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Independently conceived adjusted in this, including "There is no mis-
fortune that fails was a wise friends." (Seneca) for quantity than
said, "If six-foot giants, since new experiences tantalize in the
effect that it is the duty of rational livestock as wishwrite as
also turn an even wary-it discovery." Imaginations extremes and
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theme in the simple meaning that Secret mirror the "bad views."
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experiences come in conversions for the law with relations as the
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thought.

The judgment of philosophical years of choice is affirmed.

ALTIMARI.

Bertinelli, J., and Kokkotis, G., eds.

37191

FRANK C. RATHJE, Successor Trustee,
(Complainant) Appellee,
v.
PETER VASILLOS, et al,
(Defendants).

On appeal of MILTON H. SLMIYAN,
Appellant.

APPEAL FROM
INTERLOCUTORY ORDER OF
THE SUPERIOR COURT,
COOK COUNTY.

272 I.A. 619

Opinion filed Nov. 17, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill in equity seeking to foreclose a trust deed on certain premises owned by the defendants and praying, among other things, for the appointment of a receiver to take charge of and manage the same and to collect the rents, issues and profits. The order appointing the receiver appears to have been made after due notice had been served upon the owner of the equity of redemption in said premises and contains the statement that:

> " * * * the Court having read and considered the bill of complaint heretofore filed herein, and said motion being fully argued by counsel, and the Court being fully advised in the premises, doth find; * * * "

Nowhere does it appear in the order that any testimony was taken, evidence heard, or affidavits filed and, therefore, we are forced to the conclusion that the only evidence considered by the court, upon which it based the order appointing the receiver, was the bill of complaint. The verification to this bill of complaint is that of the complainant and, after stating that he is the complainant, the verification continues as follows:

> " * * * that he has read the above and foregoing bill of complaint by him subscribed, knows the contents thereof, and that the same is true of his own knowledge, except as to matters and things therein stated upon information and belief, and as to such matters and things he believes them to be true."

Opinion filed Nov. 17, 1933

This verification is not sufficient. So far as it is possible to ascertain from this verification, all the statements in the bill of complaint may have been made on information and belief. It is not confined to those matters stated therein "to be" on information and belief. This court in the case of Sherman Park State Bank v. Loop Office Bldg. Corp., 238 Ill. App. 450, had occasion to pass upon practically the same verification to a bill of complaint filed in that action. The court in its opinion, said:

> "If the motion for the appointment of a receiver is based upon the allegations of a bill, it must be sworn to, otherwise there is no competent evidence furnishing a basis for the appointment of a receiver. Daley v. Nelson, 119 Ill. App. 627. An examination of the affidavit attached to the instant bill of complaint shows that the alleged facts are not sworn to. The affidavit purports to be made by an agent and asserts 'to the best of his knowledge and belief the facts therein set forth are true, except as to those statements made on information and belief, and as to such statements this affiant states he believes them to be true.' This is no affidavit as to the facts. It asserts only affiant's belief that the facts therein set forth are true, except as to the statements made on information and belief, which negatives the truth of the statements, for all of the statements are made on information and belief. Such an improperly verified bill proves nothing to justify the appointment of a receiver. Siegmund v. Ascher, 37 Ill. App. 172."

See also Grabowski v. Mac Laskey 357 Ill. App. 484.

It appearing that the receiver was appointed only upon such proof as was contained in the bill of complaint and that the bill of complaint contained no verification as required, the order was of no effect.

We have not been aided in our consideration of this matter by briefs on behalf of the complainant.

For the reasons stated in this opinion the order of the Superior Court is reversed.

ORDER REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

This verification is not necessary. He did so if he is justified in assuming from this verification, the use statements in the bill of complaint only have been made on information and belief. It is not required by these matters stated cannot "be set on information and belief." This court is the case of Commonwealth Life Insurance Co. v. Lone Star Life Ins. Co., 336 Ill. App. 480, but attempts to also cite precedents the same verification to a bill of complaint filed in that action. The court in its opinion, said:

> "If the motion for the consolidation of a receiver be based upon the allegations of a bill, it must be sworn to, otherwise there is no competent evidence tendering a basis for the appointment of a receiver." Hunter v. Hunter, 112 Ill. App. 227. In consideration of the affidavit attached to the instant bill of complaint alone that the alleged frauds are not sworn to. The affidavit purports to be made by an agent and reserve the bill of the insurance and belief the facts therein are true, except as to those statements made on information and belief, and as to such statements this affiant states as follows: 'Some by in form.' This is an affidavit on to the facts. It answers only affiant's belief that the facts therein are true, except as to the statements made on information and belief, which modifies the truth of the statements. For all of the statements made on information and belief. Made on information and belief will never serve to justify the appointment of a receiver. Hunter v. Hunter, 27 Ill. App. 227.

See also Hunter v. Hunter, 27 Ill. App. 224.

It appearing that the receiver was appointed only upon such as was contained in the bill of complaint and that the bill of complaint contained no verification as required, the order was of no effect.

We have not been asked in our consideration of this matter by brief, on behalf of the appellees.

For the reasons stated in our opinion the order of the Superior Court is reversed.

ORDER REVERSED.

Gill, P.J. and Crow, J., concur.

109 A

36254

JOSEPH F. MEYR, administrator of the estate of LAWRENCE MEYR, deceased,
Appellee,

v.

A. VINCENT SONS CO., (a corporation),
Appellant.

APPEAL FROM ~~MUNICIPAL COURT OF CHICAGO.~~ Circuit Court of Cook County

272 I.A. 619

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $3800 entered on a verdict for plaintiff, Joseph F. Meyr, administrator of the estate of Lawrence Meyr, deceased, in an action against A. Vincent Sons Co., a corp., defendant, for the alleged wrongful death of the plaintiff's intestate resulting from a collision at the intersection of Prospect avenue and 99th street, between a light delivery truck driven by plaintiff's intestate and a Packard automobile driven by defendant's agent.

The declaration consisted of five counts. The first count charged that while plaintiff's intestate, in the exercise of due care and caution for his own safety, was driving a Chevrolet truck in a westerly direction on 99th street, at its intersection with Prospect avenue, it was struck by an automobile owned by defendant, and being negligently and carelessly driven south in Prospect avenue by defendant's agent, causing injuries to plaintiff's intestate that resulted in his death. The second count charged that defendant violated the Motor Vehicle Act of Illinois in driving its automobile at a speed greater than was reasonable

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and proper and at a speed in excess of ten miles an hour. The third count charged that defendant negligently drove its motor vehicle at a speed greater than was reasonable and proper and in excess of fifteen miles an hour. The fourth count alleged that defendant was negligent in that it violated the statute in failing to observe its duty in blowing a horn, ringing a bell or giving a signal, and in failing to have sufficient brakes. The fifth count charged defendant's automobile was being driven at the time and place in question, wilfully, wantonly and recklessly. Defendant filed a plea of the general issue.

It is urged for reversal that plaintiff failed to establish the fact of due care on the part of plaintiff's intestate; that he was guilty of contributory negligence as a matter of law in failing to yield the right of way at the street intersection to defendant, and that an instruction to direct a verdict requested by defendant at the close of plaintiff's case, and again at the close of all the evidence, should have been given for that reason; that the fifth count charging wilful and wanton acts on the part of defendant was not sustained by the evidence and that judgment based on that count of the declaration constitutes reversible error; that the court erred in giving instructions Nos. 1, 2 and 11 requested by plaintiff.

Plaintiff's theory is that although plaintiff's intestate was approaching Prospect avenue from the east, and defendant's Packard car was approaching the intersection from the north, and to his right, yet he had the right of way and was not guilty of contributory negligence; that defendant's car was being driven at an unlawful and unreasonable rate of speed and the jury was justified in finding from the evidence and physical facts and circumstances that defendant's negligence alone was responsible for the

and proper and at a speed in excess of ten miles an hour. The trial court charged that defendant negligently drove his motor vehicle at a speed greater than was reasonable and proper and in excess of fifteen miles an hour. The fourth count charged that defendant was negligent in that it violated the statute in failing to observe the duty in blowing a horn, ringing a bell or giving a signal, and in failing to have sufficient brakes. The fifth count charged defendant's automobile was being driven at the time and place in question, wilfully, wantonly and recklessly. Defendant filed a plea of the general issue.

It is argued for reversal that plaintiff failed to establish the fact of due care on the part of plaintiff's intestate; that he was guilty of contributory negligence as a matter of law in failing to yield the right of way at the street intersection to defendant, and that an instruction to direct a verdict in favor of defendant as the slayer of plaintiff's wife, and again at the close of all the evidence, should have been given. We present that the fifth count charging wilful and wanton acts at the time of defendant was not established by the evidence and that the jury's finding on that count of the declaration constitutes reversible error. I, I and II recognize by plaintiff.

Plaintiff's theory is that although plaintiff's intestate was approaching Prospect avenue from the east, and defendant's automobile was approaching the intersection from the north, and so his right, yet he has the right of way and was not guilty of contributory negligence; that defendant's car was being driven at an unlawful and unreasonable rate of speed and the jury was justified in finding from the evidence and physical facts and circumstances in the case that defendant's negligence was the proximate cause of the death of plaintiff's intestate.

injuries that resulted in the death of plaintiff's intestate; that there was sufficient evidence to sustain the wilful and wanton count of the declaration and that, in any event, defendant cannot prevail in this court by reason of the alleged error of the trial court in entering judgment on a declaration containing a wilful and wanton count, which it is charged was not sustained by the evidence, since defendant failed to present a separate motion and instruction directed to that count at the close of all the evidence but merely offered a general motion and instruction.

There is a sharp conflict between the testimony of the witnesses for plaintiff and the witnesses for defendant as to the manner in which the collision occurred.

It appeared that the collision took place August 4, 1930, about 3 p. m.; that 99th street is 40 feet from curb to curb and Prospect avenue 36 feet; that both streets were well paved, except that there was some loose concrete on 99th street at the alley east of Prospect avenue; that Charles street was one block east of Prospect avenue; that there was a two story residence at the northeast corner which stood 25 feet east of the east sidewalk of Prospect avenue and 12 feet north of 99th street; that the southeast corner was vacant, but that there was a building on the east side of Prospect avenue 50 feet south of 99th street and 42 feet back from the east sidewalk of Prospect avenue; that there was a church on the southwest corner with a 13 feet parkway between the south curb of 99th street and the sidewalk; that there was a fire hydrant a few feet west of the west curb of Prospect avenue and 26 feet south of the south curb of 99th street, and a lamp post at the southwest corner between the southwest rounded curb and the sidewalk; that there was

injuries that resulted in the death of plaintiff's intestate; that there was sufficient evidence to permit the verdict and decision upon appeal of the defendants and that, in any event, substantial cause of justice in this court by reason of the alleged error of the trial court in sustaining judgment on a declaration containing a valid and sufficient count, which it is charged was not assailed by the evidence, since defendant failed to present a separate motion and instruction directed to that count at the close of all the evidence but merely offered a general motion and instruction.

There is a sharp conflict between the testimony of the witnesses for plaintiff and the witnesses for defendant as to the manner in which the collision occurred.

It appeared that the collision took place about 6:30 P.M., about 3 p.m. that truck moves in 40 feet from north to south and transport avenue 50 feet; that both streets were well paved, except that there was some loose material on both sides of the right road of transport avenue; that Charles Adams was a tow truck driver at the municipal garage which stood 18 feet south of the east sidewalk of Prospect avenue and 12 feet north of 39th street; that there was a church on the southwest corner with a 12 foot parkway between the south curb of 39th street and the sidewalk; that there was a fire hydrant a few feet east of the west curb of transport avenue and 38 feet south of the south curb of 39th street, and a light post at the southwest corner between the sidewalk inside curb and the sidewalk; that there was

vacant ground on the northwest corner with a building setting back 100 feet to the north of 99th street, and that there were other buildings to the north of that; that just inside the west curb of Prospect avenue and 135 feet north of 99th street was a Chicago Motor Club sign which read, "Slow Dangerous Intersection;" that there was no sign of any kind at that time on 99th street in the block east of Prospect avenue; that the east sidewalk of Prospect avenue at 99th street was 6 feet wide, and the parkway between it and the east curb was 8 feet; that as a result of the collision the left running board of defendant's Packard car was broken and the apron covering the frame of the car on the left side was dented and scraped, commencing at a point near the left front windshield post, and both left doors showed dents; that the right side of the Packard car was damaged from its contact with the lamp post on the southwest corner and the fire plug to the south of it; that the right side of the front bumper of the Chevrolet truck was broken and the right front fender, headlight, wheel and right side of its radiator were bent or twisted as shown by the photographs in evidence; that the lamp post at the southwest corner was broken at its base and the fire plug to the south of it was bent and pushed out of position.

Plaintiff's evidence disclosed that Bernard Meyr, about twenty two years old at the time of the accident, was riding with his brother Lawrence, plaintiff's intestate, eighteen years old, in a half ton paneled body Chevrolet delivery truck belonging to their father; that Lawrence was driving the truck and Bernard was seated to his right; that they had left their father's place of business several blocks east of the occurrence to make a delivery of glass some distance west of Prospect avenue; that when the truck passed Charles street, going west, it was going twenty five

miles an hour on the right side of 99th street, near the center; that when the truck reached the alley between Charles street and Prospect avenue, it slowed down to a speed of between twenty two and twenty five miles an hour because of some holes or loose concrete in the street; that it was impossible to see north on Prospect avenue until the truck reached a point opposite the house on the northeast corner; that when the truck reached a point even with the house on the northeast corner, or about 35 feet east of the east curb of Prospect avenue, Bernard Meyr saw the Packard about 208 feet north of the north curb of 99th street, coming south on Prospect avenue; that at that time it was going thirty five or forty miles an hour and that it was slowing down; that when the Meyr truck reached the east sidewalk of Prospect avenue the Packard was about opposite the "Slow Dangerous Intersection" sign, 133 feet north of 99th street and still slowing down; that when opposite this sign the Packard was going from thirty to thirty five miles an hour; that when the truck reached the east curb of Prospect avenue, the Packard which had passed the sign suddenly increased its speed and traveled at a rate of over forty miles an hour from the time it passed the sign until almost at the point of the collision when it appeared to slow down a little; that when the truck was about 2 feet from the center of the intersection the deceased spoke to his brother, put his foot on the brake and turned the car in a southwesterly direction; that at the point of the impact the right front wheel of the truck was just past the center line of Prospect avenue and its left front wheel was just south of the center line of 99th street; that when the truck was ~~[illegible]~~ in that position the Packard shot ahead, came right through and caught the right front wheel and fender of the truck with the left side of the Packard at a point about opposite its left door and

spun the rear end of the truck around to the north and west and the truck overturned on the south curb of 99th street facing east, the front end being about 4 feet west of the west curb line of Prospect avenue; that the Packard continued in a southwesterly direction, striking the lamp post, and finally stopping when it struck the fire plug, which was 26 feet south of the south curb of 99th street.

Armand Chiappari testified in behalf of defendant that he was about twenty one years old at the time of the accident; that he was a salesman for defendant and was driving its Packard automobile at the time of the collision; that he was driving south on Prospect avenue toward 99th street at a speed of twenty miles an hour; that as he approached the intersection he slowed down to seventeen or eighteen miles an hour; that when he reached a point about 50 feet north of the north curb of 99th street he looked to the west and saw that nothing was coming and that he then looked to the east and saw a light truck about 250 feet to the east coming west; that at that time he formed no opinion as to the speed of the truck; that he proceeded to cross 99th street and was slightly more than half way across when he heard the roar of a motor to his left; that he looked around and saw the truck about 15 feet away coming toward him at a speed of forty five miles an hour; that he tried to speed up, but the truck hit his car on the left side and tossed it up against the electric light post on the southwest corner and the fire hydrant south of it; that the truck struck his car a little behind the center of the running board on the left side; that after the collision the Packard went only about 4 or 5 feet; that at the time of the impact he was driving about 3 feet from the west curb of Prospect avenue and the impact drove the car against the west curb where it stopped.

upon the road one of the blocks around in the morning and was just the truck overturned on the down side of this steep hairpin bend, the first and only wheel first were of the next year. Site of the point showing that the tractor overturned on a hairpin-shaped-firstness, avoiding the jump point, and directly straight when it struck the tree point which was in fact built of the rough such of this street.

Second Engineer testified on behalf of defendant that he was about twenty one years old at the time of the accident; that he was a salesman for defendant and was driving the defendant automobile at the time of the collision; that he was driving north on Fremont avenue towards with street at a speed of twenty miles an hour; that as he approached the intersection he slowed down to seventeen or eighteen miles an hour; that when he reached a point about 50 feet north of the north curb of 90th street he looked to the west and saw that nothing was coming; and that he then looked to the east and saw a light truck about 200 feet to the east coming west; that at that time he formed no opinion as to the speed of the truck; that he proceeded to cross 90th street and was slightly more than half way across when he heard the roar of a motor to his left; that he looked around and saw the truck about 30 feet away coming toward him at a speed of forty five miles an hour; that he tried to speed up, but the truck hit his car on the left side and caused it to rebound the electric light post on the southwest corner and the fire hydrant south of 91 st; that the truck struck him out a little behind the center of the running board on the left side; that after the collision the Packard went only about 4 or 5 feet; that at the time of the impact he was driving about 3 feet from the west curb of Fremont avenue and the impact drove the car against the west curb where it stopped.

Henry M. Cooke testified in behalf of defendant that he was on the east side of Prospect avenue, south of 90th street, and that his attention was attracted by the noise of the motor of the Chevrolet truck going west in 90th street, and that at that time he saw the Packard coming south on Prospect avenue at a speed of twenty five miles an hour; that the truck was going between thirty five or forty miles an hour and that when he first saw it it was from 75 to 100 feet east of the east curb of Prospect avenue; that he watched both cars as they proceeded and that the Packard reached and entered the intersection first; that both cars continued across the intersection and that when the truck got to about the center of Prospect avenue it turned a little to the south and went against the Packard at about the center or toward the rear of its left side; that the two cars came together about 10 or 15 feet from the southwest curb and that at the time of and just before the collision the Packard was going twenty five miles an hour and the Chevrolet truck between thirty five and forty miles an hour.

It is apparent that there was no possible basis on which the jury could reconcile the testimony of plaintiff's witnesses with that of defendant's witnesses, and it was the duty of the jury to determine which evidence was most worthy of belief when considered in connection with the indisputable physical facts and all the circumstances surrounding the occurrence. If there is evidence in the record which if undisputed would be sufficient to sustain the verdict, a court of review is not warranted in disturbing it unless it can say from all the evidence that the verdict is contrary to the probative force of evidence.

In passing on a somewhat similar situation in Ames v. Armour, 257 Ill. App. 449, 452, this court said:

Henry R. Cooke testified in behalf of defendant that he was on the west side of Freeport avenue, south of 90th street, and that his attention was attracted by the noise of the motor of the Chevrolet truck going west in 90th street, and that at that time he saw the Packard coming north on Freeport avenue at a speed of twenty-five miles an hour; that the truck was going between fifty-five or forty miles an hour and that when he first saw it was from 75 to 100 feet east of the east curb of Freeport avenue; that he noticed both cars as they approached and that the Packard reached and entered the intersection fifty-five or more continued across the intersection and that when the truck got to about the center of Freeport avenue it swerve a little to the south and went against the Packard at about the middle or toward the rear of its left side; that the two cars together about 12 or 15 feet from the southwest curb and that at the time of and just before the collision the Packard was going twenty-five miles an hour and the Chevrolet truck between thirty-five and forty miles an hour.

It is apparent that there was no possible basis on which the jury could reconcile the testimony of plaintiff's witnesses with that of defendant's witnesses, and it was the duty of the jury to determine which evidence was most worthy of belief when considered in connection with the indisputable physical facts and all the circumstances surrounding the occurrence. If there is evidence in the record which if undisputed would be sufficient to sustain the verdict, a court of review is not warranted in disturbing it unless it can say from all the evidence that the verdict is contrary to the preponderating force of evidence.

In passing on a somewhat similar situation in Hess v. Chase, 247 Ill. App. 419, 421, this court said:

"The evidence of the plaintiff and the driver of defendant's colliding truck is in sharp conflict, making it the burden of the jury to find which evidence was most worthy of belief, and to give credence accordingly. If they believed the evidence of plaintiff and his witnesses in preference to that of defendant's witnesses, they had that right and their verdict being the logical sequence of such condition of mind of the jurors should be sustained if it meets with our approval, which it does.

"The evidence of the truck driver of defendant may have impressed the jury as being somewhat unreliable and unconvincing. The minds of reasonable men may have reached such a conclusion."

.The questions involved here, due care of plaintiff's intestate and the alleged negligence of defendant, were clearly questions of fact for the jury to pass upon, and a careful analysis of all the evidence presented compels the conclusion that the verdict of the jury was not manifestly against the weight of the evidence.

It is urged by defendant that plaintiff's intestate was guilty of contributory negligence as a matter of law in not affording defendant the right of way at the street intersection because he was approaching it from the right. It is sufficient answer to state that this was a question of fact for the jury under all the facts and circumstances in evidence. The question of contributory negligence only becomes one of law where the evidence clearly establishes that the accident resulted from the negligence of plaintiff. If there is any difference of opinion on the question so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Chicago & Southern Traction Co. v. Jacobson, 217 Ill. 404; Patterson v. Chicago City Ry. Co., 195 Ill. App. 527.

That a person driving an automobile toward a street intersection from the right has no absolute right of way over one approaching from the left is the recognized law of this state. For a number of years the decisions of this court in construing the Motor Vehicle act have been uniform in holding that the right

"The evidence of the plaintiff and the driver of defendant's utility truck is in sharp conflict, making it the duty of the jury to find which witnesses are more worthy of belief, and to give credence accordingly. If they believed the evidence of plaintiff and his witnesses in preference to that of defendant's witnesses, they had that right and their verdict being the judged consensus of such conclusions of which of the jurors should be reasonable it is meets with our approval, which it does.

"The evidence of the issue relative of different may have impressed the jury as being somewhat unreliable and wavering. The minds of reasonable men may vary when reaching such a conclusion."

The questions involved here, the cause of plaintiff's injuries and the alleged negligence of defendant, were clearly questions of fact for the jury to pass upon, and a careful analysis of all the evidence presented compels the conclusion that the verdict of the jury can not reasonably equalize the weight of the evidence.

It is urged by defendant that plaintiff's intoxicate use quilty of contributory negligence as a matter of law in not affording defendant the right of way at the street intersection because he was approaching it from the right. It is sufficient answer to state that this was a question of fact for the jury under all the facts and circumstances in evidence. The question of contributory negligence only between one of fact where the evidence clearly establishes that the accident resulted from the negligence of plaintiff. If there is any difference of opinion on the question on that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Gilmore v. Jackson Traction Co. v. Burgess, 117 Ill. 339; Pathfinder v. Chicago City Ry. Co., 141 Ill. App. 627.

That a driver driving an automobile toward a street intersection from the right has an absolute right of way over one approaching from the left is the recognized law of this state. For a number of years the decisions of this court in construing the Motor Vehicle act have been uniform in holding that the right

of way at street intersections is governed by the facts and circumstances of each case, and particularly the distances from the street intersection of the respective vehicles as they approach it and the rates of speed at which they are traveling.

In discussing this doctrine in Salmon v. Wilson, 227 Ill. App. 286, this court said, p. 288:

"While the statute gives the right of way to vehicles approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to confer that right regardless of the distance the approaching cars may be from the point of intersection. It does not contemplate that the right may be invoked when the car from the right is so far from the intersection at the time the car from the left enters upon it, that, with both running within the recognized limits of speed, the latter will reach the line of crossing before the former will reach the intersection. Under the state of facts in this case plaintiff might reasonably have presumed that defendant would not exceed the speed limits fixed by statute, and that he would be able to cross the intersection before defendant's car reached it. Under the claim of right of way defendant certainly had no right to keep up a speed that was prima facie a violation of the law and run down one who was observing the law. The statute contemplates the assertion of such rights of way where cars approach the intersection at about the same time."

Plaintiff insists that there was evidence before the jury sufficient to sustain a verdict on the fifth count of the declaration charging the driver of defendant's automobile with wilful and wanton conduct. According to plaintiff's theory the driver of the Packard car, in the face of the warning sign "Slow Dangerous Intersection," drove his automobile at a speed of forty miles an hour in an endeavor to cut off or get ahead of plaintiff's truck which he saw, and ~~xxxx~~ this constituted such a conscious indifference to consequences as to establish constructive or legal wilfulness. The jury could properly accept plaintiff's theory and could properly conclude that Chiappari's conduct, in disregarding the warning sign and driving across the intersection at a high rate of speed, manifested a reckless disregard of the safety of others. But even if there was not sufficient evidence in the record to support the wilful count of

of any at issue interpretations is governed by the facts and circumstances of each case, and particularly the distances from the overt interpretations of the suspective vehicles to ship approach lit and the speed of speed at which they are travelling.

In discussing this decision in Gaines v. Illinois, 207 Ill. App. 386, this court said, p. 388:

"While the statute gives the right of way to vessels approaching along intersecting highways from the right over those approaching from the left, it manifestly does not intend to abrogate the right regulations of the statutes the approaching ships as from the point of intersection. It does not contemplate that the right may be invoked where the car from the right is so far from the intersection as the time the car from the left enters upon it, that, with both running within the prescribed limits of speed, the latter will reach the line of crossing before the former will pass the intersection. Under the rule of fact in this case plaintiff might reasonably have presumed that defendant could not exceed the speed limits fixed by statute, and that he would be able to cross the intersection before defendant's car was but 15 feet from the point of fact at any reasonable speed and so right to be up up a speed that was given rise to a violation of the law and run down one who was observing the law. The evidence tending to the exception of such rights of way does not exclude the inference of about the rule that."

Plaintiff insists that there was evidence before the jury sufficient to warrant a verdict on the fact of count of the defendants charging the driver of defendant's automobile with willful and wanton conduct. According to plaintiff's theory the driver of the Pontiac car, in the face of the warning with "Low Pressure Intersection," drove his automobile at a speed of forty miles an hour in an endeavor to get off or get ahead of plaintiff's train which he saw, and this conduct constituted such a conscious indifference to consequences as to constitute constructive or legal willfulness. The jury could properly accept plaintiff's theory and could properly conclude that defendant's conduct, in disregarding the warning sign and driving across the intersection at a high rate of speed, manifested a reckless disregard of the safety of others. But even if there was sufficient evidence in the record to support the willful count of

the declaration, the failure of the trial court to withdraw same from the consideration of the jury, under similar circumstances, has been held not to constitute reversible error. In Cigperly v. Carmack, 258 Ill. App. 593, the court said, p. 599:

"It is urged by the defendant that the court erred in not withdrawing the wilful count of the declaration from the consideration of the jury as the evidence was not sufficient to sustain a finding under said count. The record shows that the instructions given to the jury bearing upon the law of the case, all had to do with the question of the negligence of the defendant and due care on the part of the plaintiff. The question with reference to the wilful and wanton conduct was not submitted to the jury by the instructions. The rule is that the trial court should not permit the pleadings in civil action to be taken by the jury when it retires to consider of its verdict and a reviewing court must assume that the court did its duty in this respect and did not allow the pleadings to be taken by the jury when it was sent out to consider of its verdict. Lerette v. Director General, 306 Ill. 348-355; Bernier v. Illinois Cent. R. Co., 296 Ill. 464-472. Since the question involved with reference to wilful and wanton conduct was not submitted to the jury by the instructions and as we are to presume that they did not have the pleadings in the case, we think there was no error committed in this respect."

The doctrine enunciated in this case is particularly applicable to the instant case inasmuch as the record here shows that the instructions given to the jury, bearing upon the law of the case, all had to do with the question of the negligence of defendant and due care on the part of plaintiff. The question of the alleged wilful and wanton conduct was not submitted to the jury by the instructions of the court.

In this cause the trial judge did not refuse to withdraw the fifth or wilful count from the consideration of the jury. No separate motion or instruction was presented directed to that count, either at the close of plaintiff's case or at the close of all the evidence, and defendant is precluded from predicating error on the refusal or failure of the court to act in that regard since no motion was made or instruction requested by defendant except the general motion and instruction covering all of the counts of the declaration.

Defendant asserts that a general verdict based on counts

the decision; the failure of the trial court to withdraw some from the consideration of the jury, under similar circumstances, has been held not to constitute reversible error. 24 Cyclopedia, sec. 1724, pp. 282, the court said, p. 283:

"It is urged by the defendant that the court erred in not withdrawing the willful counts of the declaration from the consideration of the jury by the evidence was not sufficient to make a finding under both counts. The record shows that the instructions given to the jury covering the law of the case, all had to do with the question of the negligence of the defendant and due care on the part of plaintiff. The question of the alleged willful and wanton conduct was not submitted to the jury by the instructions of the court.

In this case the trial judge did not refuse to withdraw the first or willful counts from the consideration of the jury. No separate motion or instruction was presented directed to that count, either at the close of plaintiff's case or at the close of all the evidence, and defendant is precluded from predicating error on the refusal to direct a verdict in its favor in that regard since no motion was made or instruction requested by defendant covering the general issue and instruction covering all of the counts of the declaration.

Defendant asserts that a general verdict based on counts

of general or ordinary negligence and a count of wilful and wanton conduct cannot stand when the evidence does not support the wilful and wanton count, and cites in support of its contention Gringstaff v. N. Y. Cent. R. R., 253 Ill. App. 589; O'Neall v. Blair, 261 Ill. App. 470; Stoike v. Benasera, 243 Ill. App. 231; and Streeter v. Humrichouse, 261 Ill. App. 556. Even were this the rule it would not be applicable to this case.

However, we cannot subscribe to the doctrine pronounced in these cases and think the law is correctly stated in the specially concurring opinion of Mr. Justice O'Connor in Price v. Bailey, 265 Ill. App. 358, 365, in which the first division of this court specifically disagreed with the conclusion on this rule of law reached by the court in those cases. After a careful analysis of many decisions of our Supreme and Appellate court, the specially concurring opinion in the Price case, supra, concluded as follows, on page 368:

> "In my opinion, the judgment rendered in a personal injury case, where there are counts charging the defendant with what might be termed ordinary negligence, and a count or counts charging the defendant with such negligence as the law would hold to be equivalent to wilful and wanton conduct, a general verdict and judgment on the verdict in favor of plaintiff, might be sustained although the evidence was insufficient to sustain the wanton charge. One good count with supporting evidence is sufficient. Scott v. Parlin & Orendorff Co., 245 Ill. 460."

This pronouncement of the law was adhered to by the same division in the later case of Hawkins v. McClun, 266 Ill. App. 601. (Abst. opinion.)

We have carefully examined and considered instructions Nos. 1, 2 and 11 given by the court at plaintiff's request, and upon which defendant has assigned error, and while they might have been more aptly phrased, we are of the opinion that these instructions considered with all of the other instructions given by the court, together and as a whole, correctly states the law of the case, and that the jury was not misled by the instructions,

of proof or contributory negligence and a count of wilful and wanton conduct cannot stand when the evidence does not support the wilful and wanton count, and either in support of the contention [illegible] v. St. Louis, L.A. & T. R.R., 224 Ill. App. 589; O'Neill v. Hein, 241 Ill. App. 476; Hodge v. Sweeney, 245 Ill. App. 321; and Hoeche v. Chicago, 251 Ill. App. 368. Even were this the rule it would not be applicable to this case.

However, we cannot subscribe to the contrary pronouncement in these cases and which we find to be particularly stated in the specially concurring opinion of Mr. Justice Wilson in Hoeche v. Hoeche, 251 Ill. App. 368, 380, in which the first sentence of this court specifically disagreed with the conclusion in this case or has proven by the court in that case. After a careful analysis of many decisions of our courts and appellate courts, the specially concurring opinion in the Hoeche case, supra, states as follows, on page 380:

"In my opinion, the judgment rendered in a personal injury case, where there are counts charging the defendant with wilful, or based evidence negligence, and a count or counts charging the defendant with such negligence as the law would hold to be equivalent to wilful and wanton misconduct, a general verdict and judgment on the verdict in favor of plaintiff, which be sustained although the evidence was insufficient to support the wilful and wanton charge. The good cause with negligence, although the evidence is sufficient." Hoeche v. Chicago & Northwestern Ry., 251 Ill. App. 368.

This pronouncement of the law was adopted as by the same citation in the later case of Sweeney v. Hodge, 245 Ill. App. 321. [Emphasis supplied.]

We have carefully examined and considered instructions Nos. 1, 2 and 11 given by the court at plaintiff's request, and upon which defendant the analysis error, and while they might have been more aptly phrased, we are of the opinion that these instructions considered with all of the other instructions given by the court, together and as a whole, correctly stated the law of the case, and that the jury was not misled by the instructions

either as to the degree of care the defendant was bound to exercise in operating its car, under all of the circumstances in evidence, or as to plaintiff's burden of proving that his intestate was not guilty of contributory negligence.

For the reasons given the judgment of the Circuit court is affirmed.

AFFIRMED.

Gridley and Donnlan, JJ., concur.

either as to the degree of care the defendant was bound to exercise in operating the car, under all of the circumstances in evidence, or as to plaintiff's duties of operating that his passenger was not guilty of contributory negligence.

For the reasons given the judgment of the district court is affirmed.

AFFIRMED.

Bratley and Jackson, JJ., concur.

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36480

BLANCHE L. COOK, Appellee,	)	
v.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
AXEL JOHNSON, Appellant.	)	

272 I.A. 619

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment of the Superior court for $3000 rendered against him on the verdict of a jury for personal injuries alleged to have been sustained by plaintiff as a result of a collision between an automobile driven by her and that of defendant driven by him.

Plaintiff filed a declaration consisting of three counts. The first count alleged due care on the part of plaintiff and that her injury was caused by the negligent operation of defendant's automobile. The second count, which the jury was instructed to disregard at the close of all the evidence, alleged wilful and wanton conduct in the operation of defendant's automobile. The third count averred that the highways Oak Park avenue and LeMoyne avenue, where they intersect at the point involved in this occurrence, pass through a residential portion of Oak Park, an incorporated village, and that defendant negligently drove his car at a rate of speed in excess of fifteen miles an hour, and at a rate of speed that was not reasonable and proper, having regard to the traffic and use of the highway, so as to endanger the life and limb of plaintiff. No issue is raised on the pleadings.

The collision occurred March 1, 1931, about 6:25 p.m., at the intersection of Oak Park and LeMoyne avenues, Oak Park. Oak Park avenue is a well paved through street, running north and south, and LeMoyne avenue is a well paved street intersecting Oak Park avenue, one block south of North avenue. Plaintiff's automobile approached the intersection from the east on LeMoyne avenue and defendant was driving south on Oak Park avenue. Both cars were carrying lights; there were street lights at the intersection and a stop sign on the north side of LeMoyne avenue east of Oak Park avenue.

Defendant contends that no negligence was shown on his part; that he was approaching the intersection on a through street to plaintiff's right and had the right of way; that plaintiff was guilty of contributory negligence in driving into the intersection, and that the court erred in giving instruction No. 4 requested by plaintiff.

Plaintiff's theory is that although she was approaching Oak Park avenue, a through street, from the east, and defendant was approaching the intersection from the north and to her right, yet she had the right of way and was not guilty of contributory negligence; that defendant was driving his car at an unlawful and unreasonable rate of speed, and that the jury was justified in finding from the evidence and physical facts and circumstances that defendant's negligence alone was responsible for her injuries.

There is a sharp conflict between the testimony of the witnesses for plaintiff and defendant as to the manner in which the collision occurred.

Plaintiff's evidence disclosed that she was alone and driving her own car; that she brought her car to a stop at the stop sign about twelve feet east of Oak Park avenue before she started

The collision occurred March 5, 1973, about six p.m., at the intersection of 6th Street and Jackson Avenue, 6th Street runs east and west, and Jackson Avenue is a well paved thoroughfare, running north and south, and Jackson Avenue is a well paved street intersecting 6th Street perpendicular, and also with north and south traffic. Plaintiff's automobile approached the intersection from the north on Jackson Avenue and defendant was driving south on 6th Street towards. Both cars were carrying lighted signs; were about eight in the intersection and a stop sign on the north side of Jackson Avenue and 6th Street avenue.

Defendant admits that he negligently was guilty in his part; that he was approaching the intersection at a rapid speed; the plaintiff's claim was that the right of way; that plaintiff was guilty of contributory negligence in driving into the intersection, and that the owner error in driving instructions for a recovery by plaintiff.

Plaintiff's theory is that although the was approaching 6th Street avenue, a thoroughfare, from the south, the defendant was approaching the intersection from the north and on his right, yet she had the right of way and was not guilty of contributory negligence; that defendant was driving his car at an unlawful and unreasonable rate of speed, and that the jury was justified in finding from the evidence and physical facts and circumstances that defendant's negligence alone was responsible for her injuries.

There is a short verdict herein the testimony of the witnesses for plaintiff and defendant as to the manner in which the collision occurred.

Plaintiff's witnesses testified that her car slowed and stopped but one car; that she brought her car to a stop at the stop sign about twelve feet south of 6th Street avenue before she started

to cross the street; that she looked both to the north and south and saw no automobiles; that she started her car from a standstill, and as it crossed Oak Park avenue it attained a speed of approximately twenty miles an hour; that when the front end of her car had passed the center of Oak Park avenue she saw plaintiff's car about 90 or 100 feet north of her coming at a high rate of speed; that when she saw his car approaching at a terrific rate of speed she put her foot on the accelerator and tried to get across Oak Park avenue before his car reached her; that she was driving her car close to the north curb of LeMoyne avenue to avoid glass that was in the highway and defendant was driving well to the west side of Oak Park avenue and continued in a straight line south; that defendant's car struck the right rear wheel and fender of her car when she was at some point west of the center line of Oak Park avenue; that the rear end of her car was shoved to the south and skidded to the west, finally turning over on its left side facing east near the south curb of LeMoyne avenue just west of Oak Park avenue; that after the accident defendant's car stood in the intersection facing southwest about ten feet from defendant's car; that the only damage to defendant's automobile was to its front end; and that North avenue was about 500 feet north of LeMoyne avenue.

Defendant's evidence was to the effect that he was driving south on Oak Park avenue, having turned into that street from North avenue; that Oak Park avenue is about 33 or 35 feet wide and LeMoyne avenue about 30 feet wide; that he was driving at a speed of twenty to twenty five miles an hour and when he reached a point about 20 or 30 feet north of the north curb line of LeMoyne avenue plaintiff's car was about 20 or 30 feet east of the step light on LeMoyne avenue, which step light was 12 feet east of the east curb of Oak Park avenue; that plaintiff did not

stop at the stop sign but continued driving west into and across Oak Park avenue at a speed from thirty to forty miles an hour; that the right side of his car was about 12 feet east of the west curb of Oak Park avenue; that when he saw that plaintiff did not stop or check her speed, he applied his brakes and his car was practically at a standstill, and not more than one or two feet into LeMoyne avenue when the right rear end of plaintiff's car struck the left front end of his car; that immediately prior to the impact plaintiff had turned the front of her car toward the southwest; and that his car stopped at the point of collision, not moving any perceptible distance either from its own momentum or from the force of the impact of plaintiff's car.

It is readily apparent that there was no possible basis on which the jury could reconcile the testimony of plaintiff's witnesses with that of defendant's witnesses. Plaintiff's theory that she was well beyond the center of Oak Park avenue when defendant's car coming from the north at a high rate of speed struck the right rear fender and wheel of her car, which was running at a speed of not to exceed twenty miles an hour, checked the westward course of her automobile, and shoved its rear end to the south with sufficient force to cause it to continue to skid on its rear wheels to the west until it finally turned over on its side, is amply supported by the indisputable physical facts of the case. The position of the skid marks on the pavement, the fact that only the right rear fender and wheel and right running board of plaintiff's car were damaged as a result of the collision, and the fact that in addition to the damage to the left front bumper and fender of defendant's car, its radiator, mud pan, radiator shell, front axle, fly wheel housing and left front frame were damaged, bent or broken, and the left front headlight was smashed

up against the radiator, clearly support plaintiff's theory that defendant's car struck the right rear end of her car when she was almost clear of the intersection, with sufficient force to shove its rear end around and cause it to skid as heretofore indicated, and refute defendant's theory that while his car was either standing still, or approximately standing still with its front end not more than a foot or two into LeMoyne avenue, the right rear fender of defendant's car which was running at forty miles an hour struck his left front bumper, fender and headlight, and that his automobile did not move perceptibly as a result of being struck by a car going forty miles an hour.

In any event the questions involved here, due care of plaintiff and the alleged negligence of defendant, were clearly questions of fact for the jury to pass upon and a careful analysis of all the evidence presented compels the conclusion that the verdict of the jury was not manifestly against the weight of the evidence.

Defendant insists that plaintiff was guilty of contributory negligence in not affording defendant the right of way at the street intersection because he was approaching same from the right. It is a sufficient answer to state that this was a question of fact for the jury under all the facts and circumstances in evidence. The question of contributory negligence only becomes one of law where the evidence clearly establishes that the accident resulted from the negligence of plaintiff. If there is any difference of opinion on the question so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Chicago and Southern Traction Co. v. Jacobson, 217 Ill. 404; Patterson v. Chicago City Ry. Co., 195 Ill. App. 527.

to support his testimony, clearly supplied plaintiff's theory that defendant's car swerved in front of her car and she was the closest eye-witness of the circumstances, with testimony that is more its own witness, and which it is just as persuasive indicated, and which defendant's theory that while she was a skilled driver, or circumstantially showing that she was clear and not more than a foot or two into intersection, the fatal force factor of defendant's car which was running at forty miles an hour struck her left front fender and headlight, and that his automobile did not move perceptibly on a result of being struck by a car going forty miles an hour.

In any event the questions involved here, the case of plaintiff and the alleged negligence of defendant, were clearly questions of fact for the jury to pass upon and a careful analysis of all the evidence presented compels the conclusion that the verdict of the jury was not manifestly against the weight of the evidence.

Defendant insists that plaintiff was guilty of contributory negligence in not effectively endeavor the right of way to the street intersection because he was approaching same from the right. It is a sufficient answer to state that this was a question of fact for the jury under all the facts and circumstances in evidence. The question of contributory negligence only becomes one of law where the evidence clearly establishes that the accident resulted from the negligence of plaintiff. If there is any difference of opinion on the question on that reasonable minds may not derive at the same conclusion, then it is a question of fact for the jury.

Gibbons and Lawless Inclines Co. v. Cummings, 217 Ill. 484; Illinois Cent. R. Co. v. Cox, 126 Ill. App. 627.

Counsel for defendant insists that the testimony of plaintiff as to the respective rates of speed and distances from the intersection of the two cars is so inconsistent with the physical facts and the commonly known laws of physics, mechanics and mathematics as to render it of no probative value. This court in discussing this subject in Schwartz v. Lindquist, 251 Ill. App. 320, 323, said:

"It is said that the figures given by them would place the defendant's car across and beyond the intersection before the plaintiff's car reached the point where the accident occurred. But the cars did collide and any estimates of rates of speed or distances calculated to produce a result to the contrary must yield to this salient fact. Whether the witnesses were testifying falsely or were merely mistaken in their estimates or opinions presented a question to be considered by the jury."

Defendant next contends that the court erred in giving to the jury plaintiff's instruction No. 4, which is as follows:

"The court instructs the jury that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left, but vehicles approaching such intersections from the right shall not have the right of way over those approaching from the left regardless of the distance the approaching vehicles may be from the point of intersection, and if a vehicle approaching such intersection shall have reached and entered upon such intersection at a time when another vehicle is approaching said intersection from the right and such vehicle so approaching said intersection from the right is so far from said intersection that, if driven at a lawful and reasonable rate of speed under the circumstances, it will not reach the said intersection until the vehicle approaching from the left, if driven with due care, shall have safely crossed said intersection, then such vehicle approaching from the right shall not have the right of way over such vehicle approaching said intersection from the left."

The court, at defendant's request, gave the jury the following instructions:

No. 1. "The Court instructs the jury that at the time of the happening of the accident in question, there was in full force and effect in this State, Section 33 of the Motor Vehicle Laws, which provides that any vehicle traveling upon the public highway shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left. And, you are further instructed in this connection that when a motor vehicle is approaching an intersecting highway from the right under this provision of the Statute, it has the right of way and it then becomes and

Counsel for defendant insists that the testimony of plaintiff as to the respective rates of speed and distances from the intersection of the two cars is so inconsistent with the physical facts and the commonly known laws of physics, reasonable minds should be inclined to regard it of no probative value. This court is discussing this subject in Jaworski v. Schwindel, 221 Ill. App. 320, 322, which:

"It is said that the figures given by them would place the defendant's car across and beyond the intersection before the plaintiff's car reached the point where the accident occurred. But the cars did collide and any calculation of rates of speed or distances calculated to produce a result so the contrary must yield to this salient fact. Further the witnesses were testifying falsely or were mentally mistaken in their statements or opinions presented a question to be considered by the jury."

Defendant next contends that the court erred in giving to the jury plaintiff's instruction No. 4, which is as follows:

"The court instructs the jury that all vehicles traversing upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those coming from the left, but relative approaching each intersection from the right shall not have the right of way over those coming from the left regardless of the distance the approaching vehicles may be from the point of intersection, and if a vehicle approaching such intersection shall have reached and entered upon such intersection or a time when another vehicle is approaching with intersection from the right and such vehicle so approaching with intersection from the right is so far from such intersection that, if driven at a lawful and reasonable rate of speed under the circumstances, it will not reach the said intersection until the vehicle approaching from the left, if driven with due care, shall have safely crossed said intersection, then such vehicle approaching from the right shall have the right of way over such vehicle approaching and intersecting from the left."

The court, at defendant's request, gave the jury the following instructions:

No. 1. "The court instructs the jury that at the time of the occurrence of the accident in question, there was in full force and effect in this state, section 32 of the motor vehicle law, which provides that any vehicle traveling upon the public highway shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left; and you are further instructed in this connection that when a motor vehicle is approaching on an intersecting highway from the right under this provision of the statute, it has the right of way and it then becomes and

is the duty of the driver of any other motor vehicle approaching the same intersection from the left, to then stop his car or sufficiently check its speed so as to allow the car approaching from the right to pass in front of it.

"And, the Court further instructs you that while this does not excuse or relieve the driver of a motor vehicle approaching this intersection from the right, of the duty to exercise due care, still such a driver has the right to assume that the driver of an automobile approaching the intersection on his left will observe the law and yield the right of way to such driver approaching from the right.

No. 2. "The Court instructs the jury that under the provisions of Section 33 of the Motor Vehicle Laws of Illinois, a vehicle is approaching an intersection from the right, and is within the meaning of the statute, entitled to the right of way when, on its left on an intersecting street, another vehicle is approaching, whose driver in the exercise of due care would or should see that unless he yielded the right of way the vehicles might or would collide."

Instruction No. 4, requested by plaintiff and given by the court, clearly reflects the construction placed upon our Right of Way statute by this court in Salmon v. Wilson, 247 Ill. App. 286; Heidler Hardwood Lbr. Co. v. Wilson & Bennett Mfg. Co., 243 Ill. App. 89; Schwartz v. Lindquist, supra; and many other decisions.

At defendant's instance the court gave his instructions Nos. 1 and 2, which stated the provisions of the Right of Way statute and its application as contended for by him. The giving of an instruction simply quoting the provisions of this statute without an explanation of the circumstances under which it is applicable has been held to be improper. In the Heidler case, supra, this court in construing this statute held on pp. 94 and 95:

"It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the

is the duty of the driver of any other motor vehicle approaching the same intersection from the left, to then stop his car or sufficiently check its speed so as to allow the car approaching from the right to pass in front of it.

"And, the Court further instructs you that while this does not command or relieve the driver of a motor vehicle approaching this intersection from the right, of the duty to exercise due care, still such a driver has the right to assume that the driver of an automobile approaching the intersection on his left will observe the law and yield the right of way to such driver approaching from the right.

No. 5. "The court instructs the jury that under the provisions of Section 21 of the Motor Vehicle Laws of Illinois, a vehicle is approaching an intersection from the right, and is within the meaning of the statute, entitled to the right of way when, on the left at an intersecting street, another vehicle is approaching, whose driver in the exercise of due care would or should know that unless he yielded the right of way the vehicles might or would collide."

Instruction No. 4, requested by plaintiff and given by the court, clearly violates the construction placed upon the right of way statute by this court in [illegible] v. [illegible], 237 Ill. App. 520; [illegible] Brothers Co. v. [illegible] & [illegible] Co. 243 Ill. App. 379; Johnston v. Stonecipher, supra, and many other decisions.

At defendant's instance the court gave him instructions Nos. 1 and 2, which stated the provisions of the Right of Way Statute and its applicability as contended for by him. The giving of an instruction simply quoting the provisions of this statute without an explanation of the circumstances under which it is applicable has been held to be improper. In the [illegible] case, supra, this court in construing this statute held on pp. 94 and 95:

"It would seem to be clear that the statute does not mean that the driver of a vehicle approaching an intersection must yield the right of way to one approaching the same intersection on his right, without regard to the distance that vehicle may be from the intersection when he reaches it or to the rates of speed at which the two vehicles are traveling. When the driver of a vehicle approaches an intersection and he sees another vehicle approaching from the right, at a greater distance from the intersection and at a speed such that, in the exercise of due care, he believes he will be across the intersection before the vehicle approaching from the right reaches it, then, in our opinion, the latter car is not one 'approaching from the right' within the

meaning of the statute, and so as to require such driver to stop or yield the right of way. Whether, in exercising his judgment and going ahead, the driver exercised due care, is, we repeat, ordinarily a question for the jury to decide. Such would be the situation, in our opinion, where, as in the case at bar, the evidence showed that the collision occurred when the car approaching from the left had reached the area beyond the middle of the intersection and the one approaching from the right had not then reached the middle of the intersection and where the car coming in from the left was struck in the rear by the front part of the car coming in from the right. In that situation, we believe it may not be said, as a matter of law, that the driver of the vehicle approaching from the left failed to exercise due care in believing that the car coming in from the right, not having reached the intersection when he did, was sufficiently far away, that, considering the rates of speed of the two cars, he had time to cross the intersection before the other car reached his line of travel. In other words, in such a situation, we believe that it may not be said, as a matter of law, that the statute applied, and that the driver coming to the intersection from the left proceeded across at his peril. It was a question for the jury to decide on all the evidence."

In line with this decision and many others of similar import, we feel that the court was warranted in giving at plaintiff's request instruction No. 4, supplementing the Right of Way statute and explaining to the jury under what circumstances the statute is applicable. In our opinion it correctly states the law pertinent to the facts of this cause.

For the reasons indicated the judgment of the superior court is affirmed.

AFFIRMED.

Gridley and Monahan, JJ., concur.

36494

O. J. SALINGER,
Plaintiff in Error,

vs.

GREENEBAUM SONS INVESTMENT COMPANY,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

272 I.A. 619

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

O. J. Salinger, plaintiff, brought an action of assumpsit in the Circuit court of Cook county against Greenebaum Sons Investment Company, defendant, to recover the value of certain bonds. The trial resulted in a verdict for defendant and judgment was entered thereon December 19, 1932. Plaintiff seeks by this writ of error to reverse the judgment and to have the cause remanded for a new trial.

The declaration alleged that on June 29, 1925, defendant was engaged in selling securities known as real estate gold bonds, and in consideration of the purchase of bonds by the plaintiff defendant agreed that it would take back the bonds at any time prior to maturity at 1% less than par, plus accrued interest, to be applied in payment of any other bonds or mortgages plaintiff might select; that under this agreement he purchased $5,000 worth of bonds of the Jeffery-73rd Block and $3,000 worth of bonds on the Davis Hotel; that on April 1, 1930, defendant had in its possession a $7,000 mortgage which plaintiff desired to take in lieu of his bonds; that he tendered his $6,000 in bonds and $1,000 in cash and offered to adjust the interest and charges in accordance with the contract theretofore entered into between plaintiff and defendant; and that defendant refused to make the exchange.

Defendant pleaded the general issue and filed a special plea based on the Statute of Frauds and asserted that there was no written note or memorandum signed by it or its agent evidencing the alleged

C. J. [illegible],

PLAINTIFF IN ERROR,

vs.

[illegible] THE INTERSTATE COMMERCE COMMISSION,
DEFENDANT IN ERROR.

[illegible] TO [illegible]
OF [illegible].

272 I.A. 619

[illegible]
MOTION FOR WRITING OF THE [illegible].

C. J. Dougherty, [illegible], through an [illegible] of [illegible] in the District Court of Polk County [illegible] Interstate Commerce Commission [illegible], [illegible], to review the [illegible] order. The [illegible] trial in a trial in [illegible] and judgment was entered October [illegible], 1920. Plaintiff moved [illegible] well of error to review the judgment and to have the cause remanded for a new trial.

The [illegible] filed on June 28, 1921, defendant was engaged in making excursions [illegible] that [illegible] was in consideration of the purchase of lands by the plaintiff. Defendant urges that it might take such the [illegible] of any time prior to activity as it been then [illegible], also [illegible] to motion in [illegible] of any other [illegible] or [illegible] right. [illegible] that under this agreement [illegible] of lands of the Dairy-Time Farm and [illegible] of [illegible] the Dairy Farm; that on April 1, 1920, defendant had in its possession a [illegible] which plaintiff desired to use in [illegible] of its farm; that he tendered his [illegible] in money and [illegible] the [illegible] with the [illegible] and [illegible] in [illegible] and [illegible] to make the [illegible].

Defendant [illegible] the general issue and filed a special plea based on the [illegible] of Florida and asserted that there was no action [illegible] at [illegible] signed by it or its agent authorizing the signing

contract.

Plaintiff contends that the parties entered into an oral agreement whereby, in the event he purchased the Jeffery-73rd Block and Davis Hotel gold bonds, defendant promised to accept them for a mortgage at any time before maturity at 1% less than par, plus interest; that upon his insistence defendant entered upon the bills of sale of the respective bonds the following memorandum: "These bonds are exchangeable for a mortgage at any time;" that inasmuch as this memorandum did not evidence all of the terms of the agreement, the court erred in denying plaintiff the right to show by parol evidence the complete contract between the parties; that the court erred in refusing to admit oral testimony to prove the contents of the bill of sale of the Davis Hotel bonds, including the exchange memorandum thereon, after the loss of the bill of sale had been properly established; that the instructions given to the jury at defendant's request, as to the measure of damages, were erroneous and confusing; and that not a scintilla of evidence was presented on the trial on the question of damages to support the theory of any instruction on damages given by the court.

Defendant's theory is that, conceding a binding contract was made permitting the exchange of the Jeffery-73rd Block bonds for a mortgage, the demand made by plaintiff for the delivery of the $7,000 mortgage and the accompanying tender of $3,000 Jeffery-73rd Block bonds, $3,000 of Davis Hotel bonds and $1,000 cash, including, as it did, the Davis Hotel bonds concerning which defendant insists no exchange agreement had been made between the parties, vitiated the tender; that whether or not an exchange agreement was made on the sale of the Davis Hotel bonds similar to the exchange agreement on the Jeffery-73rd Block bonds, was purely a question of fact for the jury; that the verdict of the jury was conclusive on that question and was not against the manifest weight of the evidence.

contract.

Plaintiff contends that the mortgage covered just as every agreement whereby, in the event he recovers the fifty-five hundred and forty dollars, defendant promises to repay them for a mortgage at any time before maturity of it. Less than six, plus interest; that upon his insistence defendant entered upon the title of sale of the respective lands the following memorandum: "These lands are encumbrance free a mortgage at any time;" that immediately on this memorandum did not exclude all of the terms of the agreement, the court erred in denying plaintiff the right to show by parol evidence the complete contract between the parties; that the court erred in refusing to admit oral testimony to prove the contents of the bill of sale of the Davis Optical Company, including the mortgage memorandum thereon, after the loss of the bill of sale had been properly established; that the instructions given to the jury at defendant's request, as to the measure of damages, were erroneous and misleading; and that not a sufficiency of evidence was presented on the trial on the question of damages to support the theory of any instruction on damages given by the court.

Defendant's theory is that, executing a binding contract that made consisting the exchange of the fifty-five hundred for a mortgage, the plaintiff made by violation for the delivery of the $7,000 mortgage and the corresponding lands of $1,000 fifty-five hundred bonds, $1,000 of Davis Optical bonds and $1,000 cash, including, as it was, the Davis Optical bonds concerning which the Federal Institute on receiving statement $1,4 also made between the parties, stipulated the latter; that "either or not to exchange agreement was made on the sale of the Davis Optical bonds similar to the exchange agreement on the fifty-five hundred bonds, was merely a question of fact for the jury; that the verdict of the jury was conclusive on that question. If we are to ignore the conflict evidence of the parties.

This judgment must necessarily be reversed and the cause remanded for a new trial because of the erroneous exclusion of competent evidence and because the trial court erred in giving improper instructions to the jury.

Plaintiff's evidence as to an oral agreement made with defendant as to the exchange of his bonds for a mortgage was clearly competent and admissible; this, notwithstanding the written memorandum evidencing the agreement. It is readily apparent that the written memorandum, "These bonds exchangeable for a mortgage at any time," did not purport to contain all the terms of the contract. The price at which the bonds were to be accepted for the mortgage, the kind of a mortgage to be exchanged, whether first or second, and the price of such mortgage, were all subject to parol proof, not for the purpose of varying the terms of the written memorandum of agreement but for the purpose of clarifying and explaining it.

The objection to plaintiff's offer to prove by parol evidence the contents of the bill of sale of the Davis Hotel bonds, including the claimed memorandum for the exchange of such bonds for a mortgage, after the loss of the bill of sale had been properly established, was untimely and the ruling of the court excluding that evidence was clearly erroneous. That evidence was not only admissible but it was manifestly material to one of the main issues of fact to be decided by the jury. The error was not and could not be cured by reason of the fact that evidence bearing on the subject indirectly came to the attention of the jury.

At defendant's request the court gave to the jury four instructions on the subject of the measure of damages in the event the jury found plaintiff was entitled to recover. These instructions were substantially to the same effect and the following is typical of all four:

This judgment must necessarily be reversed and the cause remanded for a new trial because of the erroneous rejection of competent evidence and because the trial court erred in giving improper instructions to the jury.

Plaintiff's evidence is to an oral agreement made with defendant as to the ownership of his stock for a mortgage was clearly competent and materially tell, substantiating the written documentary evidence, the opposite. It is usually supported by the written documents. "Some people exchange for a mortgage at any time," did not purport to contain all the terms of the contract. The price at which the bonds were to be exchanged for the mortgage, the kind of a mortgage to be exchanged, whether first or second, and the price of such mortgage, were all subjects for proof, not for the purpose of varying the terms of the written instrument of agreement but for the purpose of identifying and explaining it.

The objection of plaintiff's letter is given by James Wheeler the contents of the bill of sale of the South Dakota bonds, including the alleged conversations for the exchange of such bonds for a mortgage, after the issue of the bill of sale had been properly established, was material and the ruling of the court excluding that evidence was clearly erroneous. That evidence was not only admissible but it was manifestly material to one of the main issues of fact to be tested by the jury. The error was not and would not be cured by reason of the fact that evidence bearing on the subject indirectly came to the attention of the jury.

At defendant's request the court gave to the jury that instructions on the subject of the measure of damages in the event the jury found plaintiff was entitled to recover. These instructions were substantially to the same effect and the following is typical of all them:

"The jury are instructed that if you find that the defendant has broken its agreement to accept both the Jeffery and the Davis bonds for a mortgage, then you must assess plaintiff's damages in money, and in determining the amount of damages you will consider the monetary loss suffered by the plaintiff, because the defendant refused to transfer to him a mortgage for the bonds. Such monetary loss you should measure by finding the difference between the value of the bonds at the time and place when the offer to exchange was made and the value of the mortgage which the plaintiff demanded."

On still another theory the court gave to the jury, also at defendant's request, the following instruction as to the measure of damages:

"The jury are instructed that if you find from the preponderance or greater weight of the evidence that the plaintiff did obtain a written agreement in both the case of the purchase of the Jeffery bonds in 1925 and also in the case of the purchase of the Davis bonds in 1926, then you will be called upon to assess the plaintiff's damages. Such damages to the plaintiff in this case are to be measured by the benefit or profit the plaintiff would have derived if the exchange of bonds for a mortgage had been made."

A careful examination of the record discloses no evidence on which any of the five instructions on the measure of damages given by the court at defendant's request could possibly be predicated. There was not a word of evidence admitted on the trial on the question of damages. These instructions also presented to the jury two different theories as to the measure of damages applicable to the issues, and could have had no other effect than to mislead and bewilder the jury; the giving of them was reversible error.

Defendant in effect concedes the error of these instructions but insists that, inasmuch as the jury found the issues for defendant, the error was at most harmless. This contention is without merit. If the jury was inclined to find the issues for plaintiff, the jurors would have been compelled to disregard the conflicting and confusing instructions on damages and resort to conjecture in fixing plaintiff's damages.

Other contentions have been urged, but in the view we

"The jury are instructed that if you find that the attorney for the defendant, in making his closing argument, has misstated the evidence to mislead the jury, and in determining the amount of damages to which the plaintiff is entitled, you will consider the misstatement of the evidence in fixing the amount of damages.

"The jury are instructed that if you find from the preponderance of credible evidence in the case that the plaintiff has proven a written agreement, if any, the date of the performance of the military tests in 1953 did not fix the date of the performance of the tests made in 1952, then you will be unable from the evidence to assess the plaintiff's damages. Mere conjecture in the plaintiff in such case are to be considered by the jury in arriving at the plaintiff would have derived if the defendant had made the engagement had been made."

A marked misunderstanding of the powers limitations on related to which any of the time instructions on the measure of damages given by the court to defendant's counsel could possibly be prejudicial. There was not a scrap of evidence adduced on the trial in the matter of tenure. Those instructions did invite the jury the different theories as to the measure of damages applicable to the issues, and would have led an urban at least then to pointed and bewilder the jury; the giving of them was reversible error.

Talcott in effect concedes the error of these instructions but insists that, inasmuch as the jury found the issues for defendant, the error was of most harmless. This contention is without merit. If the jury was instructed to find the issues for plaintiff, the jurors would have been unwilling to disregard the conflicting and confusing instructions on damages and resort to speculation to fixing plaintiff's damages.

Other contentions have been urged, but in the view we

take of the case we deem it unnecessary to discuss them.

For the reasons indicated the judgment of the Circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

112 F

36525

MORRIS LEVY, RAPHAEL LEVY, BERNARD MENASHE and BENJAMIN MENASHE, copartners, doing business as L. & L. Mfg. Co., Appellees,

v.

GOLDBLATT BROS., Inc., Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 620

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

November 25, 1932, plaintiffs Morris Levy, Raphael Levy, Bernard Menashe and Benjamin Menashe, doing business as the L. & L. Mfg. Co., upon the trial of this cause before the court without a jury, secured a judgment for $1500 against Goldblatt Bros., Inc., in the Municipal court. This appeal followed.

Plaintiffs alleged in their statement of claim that at various times in the months of September and October, 1929, at defendant's instance and request, they sold and delivered to it merchandise of the value of $3279; that November 29, 1929, they received and accepted a check for $1779 as payment on account, and that defendant is indebted to them for the balance of $1500 due on such merchandise.

Defendant in its affidavit of merits admits the purchase and delivery of the merchandise but asserts that the same was fully paid for by its check of November 29, 1929, for $1779, and by its payment of $1500 to Frazier Jelke & Company, at the instance and request of plaintiffs on or about November 13, 1929.

Defendant contends that Morris Levy and Raphael Levy were the ostensible partners in the firm of L. & L. Mfg. Co.; that Bernard Menashe and Benjamin Menashe were dormant or secret

[illegible]

[illegible]

[illegible]

partners; that the dormant or secret partners, as such, are estopped from denying the authority of the Levys, the active partners, or either of them, to enter into the stock transaction in question and to pay for the stock with funds due the copartnership; that even if the Menashes were active partners the plaintiff copartnership could not maintain its action at law against defendant because the Levys settled the copartnership claim against defendant by authorizing and directing it to apply money due the copartnership on the purchase price of the capital stock of Goldblatt Bros., Inc.

Plaintiffs' theory is that neither the Levys nor either of them ever authorized the purchase of the Goldblatt stock for themselves as individuals or for the copartnership, and that neither of them authorized defendant to pay for the stock and allow itself a credit against the partnership account; that the purchase of stock in Goldblatt Bros. was not within the scope of plaintiffs partnership business; that such purchase and payment therefor, with money owing to the copartnership, by any of the partners, would not be binding upon the copartnership without the consent, acquiescence or ratification of all the partners; and that even though one or both of the Levys authorized the purchase of the Goldblatt stock, or the payment of same out of money owing to the copartnership, such action by them or either of them would not be binding upon the copartnership because the other copartners, Bernard Menashe and Benjamin Menashe, did not consent to or ratify either the purchase of or payment for the stock.

The burden was clearly upon defendant to establish its affirmative defense of payment.

Defendant's witness Weinstein testified that in the

transaction of defendant's business with the L. & L. Mfg. Co., over a period of ten years, he dealt only with Morris and Raphael Levy, and that in more than fifty visits to the office and factory of plaintiffs in New York city he had neither seen nor heard of the Menashes nor been advised they were copartners; that while in the office of the L. & L. Mfg. Co. in September, 1929, Morris and Raphael Levy requested him to purchase on the open market in Chicago 100 shares of defendant's capital stock, which was then listed on the Chicago Stock Exchange, for the L. & L. Mfg. Co., and to make such purchase in the name of Morris Levy; that he advised them that when he returned to Chicago he would instruct a broker to purchase the stock in the open market in the name of Morris Levy for the L. & L. Mfg. Co., but that it would be necessary for defendant to guarantee the payment of the stock, in which arrangement the Levys acquiesced; that when he returned to Chicago he purchased on the open market in September, 1929, through Frazier Jelke & Company, stockbrokers, 100 shares of the capital stock of defendant in the name of Morris Levy for the L. & L. Mfg. Co. at about $30 a share, the payment for same being guaranteed by Morris Goldblatt, president of defendant; that when he was again in the place of business of plaintiff in November, 1929, Raphael Levy told him that Frazier Jelke & Company had billed the L. & L. Mfg. Co. for the purchase price of the stock, and when he asked Raphael Levy for the money to pay for the stock all he said was that Morris Levy was out of the city; that he then advised Raphael Levy that when he returned to Chicago he would have to protect Morris Goldblatt, who guaranteed the stock account, by paying the brokers $1500 on the stock and charging it against the amount that defendant owed plaintiffs for the merchandise delivered in September and October, 1929; that Raphael Levy made no answer to this state-

transaction of defendant's business with the L. & L. Mfg. Co., was a period of two years, he dealt only with Morris and Ingham Levy; and that in more than fifty visits to the office and factory of plaintiffs in New York city he had neither seen nor learned of the defendants nor been advised they were interested that white in the affairs of the L. & L. Mfg. Co. in September, 1907, Morris and Ingham Levy requested him to purchase on the open market in Chicago 500 shares of defendant's capital stock, which was then listed on the Chicago Stock Exchange, for the L. & L. Mfg. Co., and to make such purchase in the name of Morris Levy that when he returned to Chicago he would institute a broker to purchase the stock in the open market in the name of Morris Levy for the L. & L. Mfg. Co., but that it would be necessary for defendant to guarantee the payment of the stock, in which arrangement the Levys respectively that when he returned to Chicago he purchased on the open market in September, 1907, through Fowler Kidd & Company, stockbrokers, 500 shares of the capital stock of defendant in the name of Morris Levy for the L. & L. Mfg. Co. at about $20 a share, the payment for same being guaranteed by Morris Reinhart, president of defendant; that when he was again in the place of business of plaintiff in November, 1908, Ingham Levy told him that Fowler Kidd & Company had sold the L. & L. Mfg. Co. for the market price of the stock, and when he asked Ingham Levy for the money to pay for the stock all he said was that Morris Levy was out of the city; that he then advised Ingham Levy that when he returned to Chicago he would have to produce Morris Reinhart, who guaranteed the stock account, by paying the broker $1500 on the stock and explaining it appeared the amount that defendant owed plaintiffs for the merchandise delivered in September and October, 1907; that Ingham Levy made no answer to this state-

ment of the witness; that November 13, 1929, he procured a check from defendant payable to himself, forwarded it to the brokers on account of the stock purchase and defendant allowed itself a credit of $1500 on its indebtedness to plaintiffs for merchandise; that November 26, 1929, defendant mailed its check for $1680.63, which represented $1779, less 3% cash discount, to the L. & L. Mfg. Co., accompanied by a statement of the account and what purports to be a remittance voucher, the statement containing the words "Less ck. advanced $1,500" and the remittance voucher the words "less advance $1,500;" that the check on its face bore the legend "In full as shown on remittance statement" and on its reverse side "The sum of this check is accepted as evidenced by payee's endorsement in full settlement, return if not correct;" and that this check was indorsed by the L. & L. Mfg. Co., deposited in its bank and paid in due course.

Nathan Goldblatt, secretary of defendant, testifying in its behalf, stated that he had never seen nor heard of the Menashes and did not know they were copartners in plaintiffs business; that Raphael Levy admitted to him in the presence of Morris Levy a short time before the trial, that the Levys, in behalf of the copartnership, had authorized the purchase of the stock from the brokers and had authorized defendant to pay $1500 on account of same and take credit for the payment on its indebtedness to plaintiffs.

Morris Levy testified in behalf of plaintiffs that neither he nor Raphael Levy in his presence authorized the purchase of stock either for themselves as individuals or for the copartnership, although Weinstein had urged and entreated them repeatedly to buy Goldblatt stock; that they informed him that even though it was good stock they could not afford to purchase

[illegible] of the witness; that December 12, 1929, he procured a check from defendant payable to himself, forwarded it to the brokers on account of the stock purchase and delivered stock certificates [illegible] itself [illegible] on his instructions to plaintiffs for warehousing; that November 14, 1929, defendant mailed its check for $14,[illegible], which represented $1272, less 5% cash discount, to the L. & L. Mfg. Co., accompanied by a statement of the account and what purports to be a petition to warehouse, the statement containing the words "Less advance $1,800" and the warehouse receipt the words "Less advance $1,800" that the check on its face bore the legend "In full on above on warehouse statement" and on its reverse side [illegible] of this check is endorsed in pencil by payee's cashier [illegible] in full settlement, return if not correct" and that this check was received by the L. & L. Mfg. Co., deposited in the bank and paid in due course.

Felton Building, secretary of defendant, testifying in his behalf, stated that he had never been nor heard of the Hampton and did not know they were competitors to plaintiffs. Believed that Raymond Levy admitted to him in the presence of Charlie Levy a short time before the trial, that the Levys, in behalf of the corporation, had obtained the purchase of the stock from the brokers and had authorized defendant to pay $1800 on account of them and take credit for the payment on the indebtedness to plaintiffs.

Morris Levy testified in behalf of plaintiffs that neither he nor Raymond Levy in his presence authorized the purchase of stock either for themselves as individuals or for the corporation; although testimony had been offered and excluded from evidence to the effect that they ratified and authorized the purchase, even though it was not stated they really had authority to purchase

any of it either for themselves or the copartnership; and that between November 29, 1929, and April 12, 1932, plaintiffs forwarded to defendant nine letters and three telegrams (the originals or copies of which were admitted in evidence) either demanding payment of the $1500 balance due them on the account or protesting against defendant's conduct in allowing itself a credit of $1500 on its account with plaintiffs; and that upon its receipt of defendant's check November 26, 1929, for $1680.63, it addressed and mailed to it the following letter:

"November 29, 1929

Goldblatt Bros. Dept. Store,
Chicago, Ill.
Gentlemen:

We are in receipt of your check, in the sum of $1680.63 tendered on account for invoices of September and October, for which kindly accept our thanks and utmost appreciation.

We note, however, that you have deducted from same the sum of $1500.00 and labelled same, 'less check advanced.' In looking over our records we fail to find any item of $1500 received from you in cash.

Kindly advise us the date of this check and we would also suggest that you notify your bank to stop payment of same.

We have, in the meantime accepted your check on account and would appreciate your prompt response regarding the above, and the receipt of your additional check.

Thanking you, we remain

Yours truly,
L. & L. Mfg. Co."

Levy also testified that among the letters mailed to defendant was the following:

"December 4, 1929

Goldblatt Bros. Dept. Store,
Chicago, Illinois.
Gentlemen:

Attention Mr. Morris Goldblatt.

We are today in receipt of a letter from Frazier, Jelke & Co. advising us that you sent them a check for $1500.00 in payment of an account of shares held in the name of Morris Levy.

This then, apparently, explains to us the item of $1500.00 which you deducted from our account when remitting check for three invoices of merchandise. In your remittance statement, however, you merely recorded the fact that check for $1500.00 had been advanced to us and as we had no record of receiving same we wrote to you to that effect.

We were not aware of the fact that our Mr. Levy had requested you to advance payment against shares held by him personally. After getting in communication with him we found that he

did not authorize you to do so and we really are at a loss to understand why you should attempt to deduct this amount from our invoices without consulting us of your intentions. The firm of the L. & L. Mfg. Co. are comprised of several members and they have nothing to do with the shares sent to Mr. Morris Levy personally nor are they interested in that phase of it.

We would, therefore, request that you send us your check for $1300.00 to balance your account by return mail, and if there are any matters you wish to settle that you take same up personally with Mr. Levy.

Awaiting your kind and prompt response in the form of a remittance, we remain

Yours very truly,
L. & L. Mfg. Co."

No particular errors on the part of the trial court are complained of or pointed out by defendant. No propositions of either law or fact were submitted to the trial judge for his ruling.

It must be then that defendant means to be understood as contending on this appeal that the court below misapprehended the law as applicable to the facts as they appeared in evidence. There is nothing in the record to disclose the theory upon which the finding of the court was reached. It may well be that the finding was predicated upon the failure of defendant to assume its burden of proving that the Levys, or either of them, ever authorized the purchase of the stock either individually or for the copartnership, an act clearly outside of the scope of the partnership business, or that they authorized or directed defendant to pay for the stock out of money due the copartnership or to allow itself a credit against the firm account for $1300 paid by it for the stock.

It is admitted that the merchandise in question was sold and delivered to defendant, but there is a sharp conflict in the evidence concerning the stock transaction upon which the defense is based. It is the established law of this state that a court of review will not disturb the finding of the trial court on the facts where the testimony of the prevailing side, when considered by itself, is clearly sufficient to sustain the judgment

of the court. The trial court by its finding resolved all questions of fact in favor of plaintiffs and we are unable to say the finding of the court is contrary to the probative force of the evidence. In passing upon this question in Podrasnik v. Martin, 25 Ill. App. 300, this court said, p. 302:

"The most, however, that can be said on that question is that the evidence is conflicting, and the court having found the issues for the plaintiff, will be deemed to have resolved the conflict thus raised in the plaintiff's favor, and we are unable to say that such finding is not fairly warranted by the evidence. The court below, sitting as a jury, was the proper tribunal to decide contested questions of fact, and it is not for us to disturb his finding, unless it appears to be clearly and manifestly against the preponderance of the evidence, and we are unable to say that such is the case here."

In considering the same proposition in Barnett v. Caldwell Furniture Co., 199 Ill. App. 510, the following language was used by the court:

"The testimony is in sharp conflict. The credibility of the witnesses and the weight to be accorded to the testimony of each of them was a matter peculiarly within the province of the trial judge. He saw the witnesses and observed their manner upon the witness stand - privileges not available to us - and was therefore better able than we are to judge of the weight to be given their testimony and to whom to give credence. * * * As said in Springer v. David Bradley Mfg. Co., 191 Ill. App. 48, 'where the trial court, in a trial without a jury has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere question of fact, when the testimony is conflicting, will not ordinarily be disturbed on appeal unless such findings are clearly and manifestly against the preponderance of the evidence,' citing cases. The rule is firmly established in this jurisdiction that where there is, as in this case, an irreconcilable conflict in the testimony, a court of review will not reverse the judgment of the trial court, where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. This rule environs this case, and the unyielding principle there stated is here invokable. * * *"

Our Supreme court in considering the same subject in Dalboy v. Hayes, 267 Ill. 521, held at page 525:

"We do not attach any importance to the number of witnesses called, alone, but are inclined to regard as important the credit given their testimony by the trial court, which saw and heard them testify and was better able than this court to judge of the credibility of each. Dyas v. Dyas, 231 Ill. 367; Beall v. Kingman, 227 id. 294; Finkstaff v. Steffy, 216 id. 406; Heyman v. Heyman, 210 id. 524; Amrich v. Brunsheiler, 241 id. 592."

The points urged by defendant for the reversal of this

of the money. The total sum by the trustee reached all-sorts of that is form of plaintiffs and we are unable to say the finding of the jury is erroneous in the particular form of the evidence. In reaching upon this question in Dalgleish v. Martin, 55 III. App. 344, this court said, p. 348:

"The court, however, does not be sure on this question is that the evidence is conflicting, and the court having found the issues for the plaintiff, will be deemed to have resolved the conflict this related in the plaintiff's favor, and we are unable to say that such finding is not fairly warranted by the evidence. The money being, filing as a jury, was the proper tribunal to judge contested questions of fact, and it is not for us to disturb his finding, unless it appears to be clearly and manifestly against the preponderance of the evidence, and we are unable to say that such is the case here."

In vacating the same proposition in Kunzig v. Dalgleish Packing Co., 190 III. App. 230, the following language was used by the court:

"The testimony is in sharp conflict. The credibility of the witnesses and the weight to be accorded to the testimony of each of them was a matter peculiarly within the province of the trial judge. By our the witnesses and observed their manner upon the witness stand - principles not applicable to us - and was therefore better able than we are to judge of the weight to be given their testimony and to whom to give preference. - - - As said in Dalgleish v. David Dryfoos Co., 55 III. App. 344, 'where the trial court, on a trial without a jury has had an opportunity of weighing the evidence and of hearing their testimony as it is delivered orally, from the lips of the witnesses, with our opportunity of judging of their, from the tones of such court upon mere question of fact, from the testimony in conflicting, will not ordinarily be disturbed on appeal unless such findings are clearly and manifestly against the preponderance of the evidence.' Giving weight to the rule in finally considering the question that where there is, as in this case, an irreconcilable conflict in the testimony, a court of review will not reverse the judgment of the trial court, which has the testimony of the witnesses viva voce, when considered by itself, is clearly sufficient to support the judgment. This rule applies here, and the supporting principle there stated is here invoked. - - -"

The supreme court in considering the same subject in Dalgleish v. Martin, 207 III. 348, held at page 358:

"We do not attach any importance to the number of witnesses called, alone, but are inclined to regard as important the credit given their testimony by the trial court, which saw and heard them testify and was better able than this court to judge of the credibility of each. See v. Cheney, 201 III. 227; Kunzig v. Dalgleish, 217 Ill. 1; Dalgleish v. Martin, 207 Ill. 348; Dunham v. Dunham, 171 Ill. 304; Dalgleish v. Martin, 55 Ill. App. 344."

The points argued by defendant for the reversal of this

judgment are all predicated upon the assumption that the Levys, or one of them, authorized defendant or its agent to purchase stock of defendant for and in behalf of the plaintiff copartnership and to allow itself a credit of $1500 against its indebtedness to plaintiffs because of its payment of that amount on the stock account. The finding below effectually disposes of that assumption. It is therefore unnecessary to consider defendant's contentions further.

Defendant in its affidavit of merits and upon the trial relied upon the defense of payment, but in this court it attempts to urge, apparently as an afterthought, that the receipt and acceptance by plaintiffs of its check of November 26, 1929, constituted an accord and satisfaction of the claim. Plaintiffs' letters of November 29, 1929, and December 4, 1929, offer a satisfactory explanation of their acceptance of the check on account, but in any event a party will not be permitted to advance a theory in this court that was not relied upon in the trial court and was not set forth in its affidavit of merits.

Plaintiffs have assigned cross error on the denial by the court of their motion for the assessment of interest upon their claim against defendant. We are of the opinion that plaintiffs were clearly entitled to the allowance of statutory interest on the finding of the trial court in their favor and that the court erred in refusing to include same in its assessment of damages.

For the reasons indicated the judgment of the Municipal court will be reversed and judgment entered here against appellant for $1800.

REVERSED AND JUDGMENT HERE FOR $1800 AGAINST APPELLANT, WITH FINDING OF FACTS.

Gridley and Scanlan, JJ., concur.

36525

FINDING OF FACTS.

We find as ultimate facts that there was a balance of $1500 due from defendant for merchandise sold and delivered to it by plaintiffs; that the withholding of this amount from plaintiffs constituted an unreasonable and vexatious delay of payment, and that plaintiffs are entitled to recover damages of $1800 from defendant, comprising the $1500 balance due and owing to them from defendant and four year's interest at 5% per annum, amounting to $300.

113 H

36559

JOHN S. METCALF COMPANY,
a corporation,
Appellee,

v.

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA, a
corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

272 I.A. 620

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment of the Superior court for $8,615 in favor of plaintiff, John S. Metcalf Company, and against defendant, Indemnity Insurance Company of North America, in an action of assumpsit for damages arising from the alleged breach of the terms of a policy of public liability insurance issued to plaintiff by defendant.

Plaintiff filed an affidavit of claim in support of its amended declaration, and defendant filed a plea of the general issue and an affidavit of merits or defense which was stricken on the ground of insufficiency. An amended affidavit of defense was filed and later withdrawn. Defendant then filed a second amended affidavit of defense, an amendment thereto, and several special pleas. The court sustained plaintiff's motion to strike defendant's second amended affidavit of defense, as amended, on the ground that the affidavit did not state a defense to plaintiff's action. The pleas were in turn stricken for want of a supporting affidavit of merits and judgment was entered, as in the case of default, as provided in sec. 53 of the Practice act.

No. 872 14.620

JOHN A. MORRIS CHEMICAL
a corporation,
Appellant,

v.

INDUSTRIAL INCOME, INC. PLAINTIFF
BY MEANS OF AUTOMOBILE a
corporation,
Appellees.

CHICAGO, COOK COUNTY,

APPEAL FROM JUDGMENT

No. 872 14.620

APPEALS FROM ORDERS OF THE COURT.

This appeal arose by reviewing a judgment of the Superior Court for $8,618 in favor of plaintiff, John A. Morris Company, and against defendant, Industrial Income Company of Delaware, in an action of assumpsit for damages arising from the alleged breach of the terms of a policy of public liability insurance issued to plaintiff by defendant.

Plaintiff filed an affidavit of claim in support of its amended declaration, and defendant filed a plea of the general issue and an affidavit of merits or defense which was stricken on the ground of insufficiency. In support of its motion to strike the plea and affidavit, defendant then filed a second amended affidavit of claims, an amended interrog, and several special pleas. The court sustained plaintiff's motion to strike defendant's second amended affidavit of claims, on ground, in part, on the ground that the affidavit did not state a defense to plaintiff's action. The plea came on to be stricken for cause of - supporting affidavit of merits and judgment was entered, as in the case of default, on plaintiff in sum, $8 of the Treasury and.

The amended declaration alleged that June 22, 1930, for a good and valuable consideration, defendant executed and delivered to plaintiff its public liability insurance policy, wherein and whereby the Indemnity Insurance Company of North America (hereinafter referred to as insurance company) agreed with plaintiff as follows:

"To Indemnify the Assured against loss from the liability imposed by law upon the Assured for such injuries resulting from the operations described in the Declarations, and while being performed at or from the locations stated therein, or by reasons of the ownership or maintenance of the premises described herein.

"To Defend, in the name and on behalf of the Assured, all claims or suits for such injuries for which the Assured is, or is alleged to be, liable;

"To pay all costs and expenses incurred with the Company's written consent;

"To Pay all court costs taxed against the Assured in any such suit;

"To Pay all interest accruing upon any judgment in any such suit up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the Company is liable.

"To repay to the Assured the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident."

It is further alleged that under a rider attached to the policy defendant obligated itself as follows:

"In consideration of the fact that the assured under the Policy to which this endorsement is attached has assumed certain liability of the Chicago and North Western Railway Company under an agreement reading in part as follows:

"'The Contractor agrees to indemnify and save harmless the Railway Company, its lessees, successors and assigns, and all other persons and corporations entering on the premises by direction and consent of the Railway Company, from all loss and expense arising or growing out of any injury to any employe of the Contractor while on the premises of the Railway Company (except while riding upon regular passenger trains as a passenger), however such injury may be caused and without reference to negligence or contributory negligence; also, from all loss and expense arising or growing out of any injury to any employe of the Railway Company caused by the negligence of the Contractor, or any of his employes; also, from all loss or expense arising or growing out of any injury to any persons while upon the premises of the Railway Company, caused by the negligence of the Contractor, or any of his employes; also from all loss and expense arising or growing out of any injury to any property whether belonging to the Railway Company or not, caused by any negligence of the Contractor, or any of his employes; also, from all loss and expense arising or growing out of any unpaid bills for wages, board, supplies or materials. The contractor also agrees to comply

The Lancaster defendants alleged that they, in, like, for a good and valuable consideration, effectively transferred and delivered to plaintiff the public liability insurance policy, thereby and thereby the Insurance Company of North America (hereinafter referred to as insurance company) agreed with plaintiff as follows:

"In consideration the insurer agrees from the liability imposed by law upon the insurer for such injuries resulting from the operations described in the schedule, and while being performed by or for the insureds, which shall happen during the term of the policy, or by reason of the ownership, maintenance or use of the premises described herein.

"To defend, in the name and on behalf of the insured, all claims or suits for such injuries for which the insured is or is alleged to be liable;

"To pay all costs expenses incurred with the company's written consent;

"To pay all costs taxed against the insured in any such suit;

"To pay all interest accruing upon any judgment in any such suit up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the company is liable.

"To repay to the insured the expenses incurred in providing such immediate medical relief as is imperative at the time of the accident."

It is further alleged that under a rider attached to the policy otherwise designated (Form) as follows:

"In consideration of the fact that the insured under the policy to which this endorsement is attached has assumed certain liability of the Chicago and North Western Railway Company under an agreement covering in part as follows:

"The Contractor agrees to indemnify and save harmless said the Railway Company, its lessees, receivers and assigns, and all other persons and corporations entitled to the protection by virtue of the amount of the Railway Company, from all loss and expense arising or growing out of any injury to any employee of the Contractor while on the premises of the Railway Company (except while riding upon regular passenger train as a passenger), whether such injury may be caused and attempt determined in negligence or contributory negligence. Also from all loss and expense arising or growing out of any injury to any employee of the Railway Company caused by the negligence of the Contractor, or any of the employees, also, from all loss or expense resulting or growing out of any injury to any persons within the premises of the Railway Company, caused by the negligence of the Contractor, or any of his employees, also from all loss and expense arising or growing out of any injury to any property whether belonging to the Railway Company or not, caused by the negligence of the Contractor, or any of his employees, from all loss and expense arising or growing out of any injuries suffered by any employee of the Railway Company, or any of his employees or materials. The contractor also agrees to supply

in all respects with the requirements of law relating to furnishing reports, statements and the like.'

"It is hereby understood and agreed that this policy shall extend to cover such assumed liability.

"Nothing herein contained shall vary, alter or extend any provision or condition of the policy other than as above stated.

"This endorsement becomes effective on the 22nd day of June, 1930.

"Attached to and hereby made a part of Public Liability Policy No. P45543 of the Indemnity Insurance Company of North America issued to John S. Metcalf Company."

It also alleged that two of plaintiff's employees, John Stima and Jesse Bornblaser, were injured during the course of their employment through the alleged negligence of the Chicago & North Western Railway (hereinafter referred to as the railroad company), and under such circumstances as brought their claims within the terms and provisions of the public liability policy declared on; that Stima and Bornblaser made no claim for compensation under the Workmen's Compensation Law of Wisconsin, but each of them brought a common law action for $25,000 in the Superior court of Cook county against the railroad company whose negligence was alleged to have caused their injuries; that under the indemnifying clause of its contract with plaintiff the railroad company made demand on plaintiff and defendant to defend it against these suits; that the insurance company, through its attorney, entered an appearance in the Stima case on behalf of the railroad company and caused its attorney to appear in court on behalf of that company in the Bornblaser case; that pursuant to the demand of the railroad company plaintiff employed counsel to represent it, and at defendant's request, and with the consent of the railroad company, plaintiff undertook to negotiate settlement of the Stima and Bornblaser cases on behalf of defendant, the railroad company, and plaintiff, after they had been reached on the trial call in the Superior court; that negotiations for the

In all respects save the [illegible] of the evidence to the effecting injuries, statements and the [illegible].

It is hardly necessary for [illegible] that this policy about issued to serve such [illegible].

[illegible] any problems or complaints of the policy after [illegible] effective.

"This [illegible] attorney [illegible] on the [illegible] of [illegible].

"Attached to and [illegible] part of [illegible] liability policy the [illegible] of the [illegible] company of South America issued in [illegible] Insurance Company."

It also appears that one of plaintiff's employees, [illegible] and [illegible], were injured during the course of their employment through the alleged negligence of the [illegible] a North Yakima Packing Construction [illegible] in the employ [illegible], and under such circumstances as through their claims within the terms and provisions of the public liability policy [illegible] and that [illegible] [illegible] claim in accordance under the Washington Compensation Law of [illegible], but such of them brought a [illegible] for [illegible] to the superior court of Yakima County against the [illegible] employer, where negligence was alleged to have caused their injuries; that under the indemnifying clause of the contract with plaintiff the [illegible] employer duly demand on plaintiff and defendant to defend it against such suits; that the [illegible] company, through the attorney, entered an appearance in the [illegible] on behalf of the [illegible] company and caused the attorney to appear in court on behalf of this company in the [illegible] that pursuant to the demand of the [illegible] company plaintiff employed counsel to represent it, and at defendant's request, and with the consent of the [illegible] company, plaintiff authorized to negotiate settlement of the claim and [illegible] made on behalf of defendant, the [illegible] company, and subsequently, after they had been paid by the trial court in the [illegible] court; that judgment for the

settlement of the two actions were successfully concluded by counsel for plaintiff, but before they were consummated plaintiff obtained the consent of the railroad company and defendant to each of the settlements; that before the settlement money, $4000 to Stima and $3800 to Kornblaser, was paid by plaintiff, defendant wrote a letter to plaintiff agreeing to the payments on the express understanding that the payments would not constitute a waiver of plaintiff's rights and without prejudice to the rights, obligations and duties of defendant; that following the receipt of this letter from defendant, and with the consent of the railroad company, plaintiff paid Stima $4000 and Kornblaser $3800; that in addition to the amount of the settlements defendant is liable under the policy for attorney's fees, interest on the amount paid from the date of payment, moneys necessarily expended in the preparation of the defense to the two suits and the conduct of negotiations for the settlement of same; and that defendant refused plaintiff's demand for payment.

The insurance policy as set forth in the original declaration, and by reference made a part of the amended declaration, included a schedule of declarations upon which the issuance of the policy was based, and which recites the name and address of the assured, the duration of the policy, the basis of premium payments, the character of work and classes of employees to be covered and "the trade, business or work of the assured as described below is carried on at the following location: Work in connection with job on Chicago and North Western Railway Company Kinnickinnic Elevator, Jones Island, Milwaukee, Wisconsin, only."

The original policy contained the following general indemnifying clause:

"To indemnify the assured against loss from the liability imposed by law upon the assured for such injuries resulting

settlement of the two actions was successfully negotiated by counsel for plaintiff; the factors that were considered giving rise to the amount of the original compromise and determined in each of the settlements that before the settlement among, Gauge to raise the issue for determination, was paid by plaintiff, originated from a letter to plaintiff inquiring as to payments on the expense insurance that the insurance would not constitute a waiver of plaintiff's rights and without prejudice to the rights, obligations and duties of defendants that flowing the receipt of this letter from defendant, and with the consent of the insurance company, plaintiff paid Tuine Gauge and insurance firm that in addition to the amount of the settlements defendant is liable under the policy for plaintiff's fees, interest on the amount paid from the date of payment, costs necessarily expended in the prosecution of the defense to the tort, and for costs of depositions for the settlement of same; and that defendant refuses plaintiff's demand for payment.

The insurance policy as set forth in the original declaration, and by reference made a part of the amended declaration, included a schedule of declarations upon which the insurance of the policy was based, and which contains the name and address of the insured, the duration of the policy, the basis of premium payments, the description of work and classes of employees to be covered and "the limit, liability or work of the insurer as specified below is applied as the following indicated work in connection with job in Ontario and North Western Railway Commission Structures, Cross Ties, Fabrication, Creosoting, only."

The original policy contained the following provisions, inter alia:

"It is hereby the insurer against loss from the liability imposed by law upon the assured for such injuries resulting

rom the operations described in the Declarations, and while eing performed at or from the locations stated therein, or y reason of the ownership or maintenance of the premises escribed herein."

t also contained as sec. A on limitation of liability the ollowing provision:

"The liability of the Company under this policy is imited as expressed in item 6 of the Declarations."

Item 6 of the declarations specifically referred to n the policy proper on limitation of liability provides:

"The liability of the company under this policy is imited on account of bodily injuries to one person to the um of Ten Thousand Dollars ($10,000), and, subject to the ame limit for each person, for any one accident injuring ore than one person, to the sum of Twenty Thousand Dollars $20,000), but this limitation shall not apply to the cost f defense of claims or suits, court costs, interest accruing pon any judgment or the cost of immediate surgical relief s provided for herein."

For a clear understanding and proper determination of he issues raised in this case it is necessary because of the omplicated situation presented on the facts to set them forth ith particularity.

The facts as alleged in defendant's second amended ffidavit of merits, as amended, and admitted by plaintiff's otion to strike same, are that the Indemnity Insurance Company f North America is an insurance stock company, capitalized at he million dollars, and chartered under the laws of the State f Pennsylvania, but not authorized by its charter to assume y one risk in excess of ten per cent of its capital, except hat it reinsure any such excess; that June 22, 1930, the nsurance company, insurer, executed and delivered a policy of ublic liability insurance to plaintiff, the assured, wherein efendant's liability to plaintiff for injuries suffered by ersons in any one accident was expressly limited to $20,000; hat July 25, 1930, without receiving any new or additional onsideration, defendant delivered to plaintiff a certain

from the questions discussed in the Declaration, and while holding particular or from the legislative choice therein, or by reason of the unworkably or unfairness of the provisions therein."

It also contained an sec. 4 on Limitation of Liability the following provision:

"The liability of the Company under this policy is limited as expressed in Item 3 of the Declaration."

Item 3 of the Declaration specifically referred to the policy number and limitation of liability provided:

"The liability of the company under this policy is limited on account of bodily injuries to one person to the amount of Twelve Thousand Dollars ($12,000.00), and, subject to the said limit for each person, for any one bodily injury, sickness or death of more than one person, to the sum of Twenty Thousand Dollars ($20,000.00), and this liability shall not apply to the cost of defense at trial or appeal, court costs, interest accruing upon any judgment or the cost of bondable obligations which may be required for bonds."

For a clear understanding and proper determination of the issues raised in this case it is necessary because of the complicated situation presented on the facts to set them forth with particularity.

The Court on filing in defendant's amended answer and affidavit of merits, as amended, and admitted by plaintiff's motion to strike same, are that the Indemnity Insurance Company of North America is an insurance stock company, capitalized at one million dollars, and chartered under the laws of the State of Pennsylvania, but not authorized by its charter to assume any one risk in excess of ten per cent of its capital, except that it reinsure any risk amount that June 24, 1950, the insurance company, however, accepted and delivered a policy of public liability insurance to plaintiff, the insured, wherein defendant's liability to plaintiff for injuries suffered by persons in any one accident was expressly limited to $20,000; that July 24, 1950, without receiving any new or additional consideration, defendant delivered to plaintiff a certain

indorsement or rider (provisions of rider heretofore set forth under allegations of plaintiff's declaration).

The motion also admits that no part of the liability under the contract of insurance in its final form was reinsured; that June 22, 1930, defendant executed and delivered to plaintiff a workmen's compensation and employer's liability policy of insurance, insuring plaintiff, without limit as required by law, from all loss suffered by reason of compensation claims made by employees of plaintiff or their dependents on account of injuries or deaths occurring in the construction of the Chicago & North Western Railway Kinnickinnic elevator at Jones Island, Milwaukee, Wisconsin; that it was agreed in provision "K" of said policy that defendant should be subrogated, in case of payment under the policy, to the extent of such payment, to all rights of recovery vested by law, either in the employer or in any employee or his dependents claiming under the policy against persons, corporation, associations or estates; that July 26, 1930, through the negligence of the railroad company certain of plaintiff's employees were injured and killed under such circumstances as to require plaintiff or defendant to pay compensation to them or their dependents; that neither plaintiff nor any of its employees by any negligent act contributed to such injuries and deaths; and that at the time said policies of insurance were executed and delivered, and continuously thereafter, and until and including the day of the accident a statute of the State of Wisconsin (sec. 102.29) provided:

"(a) Except in those cases provided for in paragraph (b) of this subsection, the making of a lawful claim against an employer or compensation insurer for compensation under sections 102.03 to 102.34 for the injury or death of an employe shall operate as an assignment of any cause of action in tort which the employe or his personal representative may have against any other party for such injury or death; and such employer or insurer may enforce in their own name or names the liability of such other

[illegible] or other investigations of other borrowers and thus [illegible] obligations of plaintiff's contracts).

The motion also states that on part of the liability under the contract of insurance in the final form was terminated June 30, 1939, defendant continued and activated the plaintiff's workmen's compensation and employer's liability policy of insurance. Further quotation, without limit as provided by law, from all laws enforced by reason of compensation claims made by employees of plaintiff or their dependents on account of injuries or death occurring in the operations of the Chicago & North Western Railway Company. Plaintiff's policy of insurance, attached, contains the following provision "C" of said policy that reference should be interpreted, in case of payment under the policy, to the extent of such payment, to all rights of recovery vested by law, either in the employee or in any employee or his dependents claiming under the policy against persons, corporation, associations or authority that July 30, 1939, through the negligence of the railroad company outside of plaintiff's employees were injured and killed under such circumstances as to create liability on defendant to pay compensation in them or their dependents; that neither plaintiff nor any of its employees by any negligent act contributed to such injuries and events and that at the time said policies of insurance were amended and delivered, and continuously thereafter, and until and including the day of the accident a statute of the State of Illinois (ch. 32, 22) provided:

"(a) Except in cases specially provided for in paragraph (b) of this subsection, the policy of a liability company against an employee or compensation insurer for compensation under sections 300,05 to 300,32 for the injury or death of an employee shall cover in an amount or any sums of money in lieu which the employer is at fault, provided that such policies may have eligible any other policy for such injury or death and such employee or insurer may enforce to their own use or remain the liability of such other

party for their benefit as their interests may appear. If a recovery shall be had against such other party, by suit or otherwise, the compensation beneficiary or beneficiaries shall be entitled to any amount recovered over and above the amount that the employer or insurer, or both, have paid or are liable for in compensation, to such beneficiary or beneficiaries, after deducting reasonable cost of collection, and in no event shall the beneficiary receive less than one-third the amount recovered from the third party, less the reasonable cost of collection. Settlements of such claims and the distribution of the proceeds therefrom must have the approval of the court wherein the litigation is pending, or if not in suit, of the industrial commission. The beneficiary shall be entitled to reasonable notice and opportunity to be present in person or by counsel at the approval proceedings. The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within ninety days after written demand by a compensation beneficiary, shall entitle such beneficiary or his representatives to enforce liability in his own name, accounting of the proceeds to be made on the basis above provided.

"(b) If the insurance carrier of the employer and of the third party shall be the same or if there is common control of the insurer of each, the insurance carrier of the employer shall promptly notify the parties in interest and the industrial commission of that fact; likewise, if the employer has assumed the liability of the third party he shall give similar notice; and, in default of such notice, any settlement with an injured employe or beneficiary shall be void."

It further admitted that a few days after July 26, 1930, defendant notified all persons injured in the accident, the widows or dependents of those who were killed, and the industrial commission of the State of Wisconsin that it was the common insurer of plaintiff's compensation liability and of the public liability of the railroad company; that thereafter Lila Griffin, widow of Walter Griffin, one of the deceased employees, applied to the industrial commission of Wisconsin for death benefits, and made plaintiff and defendant parties respondent; that in recognition of its liability under its workmen's compensation policy defendant August 11, 1930, paid Lila Griffin $78; that August 28, 1930, on due notice to all parties interested, Lila Griffin, plaintiff and defendant appeared before the industrial commission of Wisconsin, and by agreement of all parties and upon a written stipulation of facts, the commission made an award in favor of petitioner and against plaintiff and defendant of $5,902.50, which was in

addition to the $78 previously paid, and also the further sum of $19.50 paid to her September 4, 1930; that since the entry of the award defendant has paid to Lila Griffin $2,260.66, and is now making and will continue to make all payments necessary to fully discharge the obligation resulting from the award; that plaintiff has never paid Lila Griffin any money on account of such demand and award; that thereafter Lila Griffin made demand on the railroad company for payment of damages to her on account of its negligence in causing the death of Walter Griffin and that this demand was referred to defendant for settlement or defense; that thereupon defendant notified John S. Metcalf Company and the railroad company, that while liable to pay on behalf of the railroad company a sum not exceeding $20,000, as was required by the terms and provisions of the policy sued on, ~~xxxxxxx~~ it was entitled to reimbursement from the railroad company under the terms of the policy of workmen's compensation insurance, the Workmen's Compensation Law of Wisconsin, and the law of that state, in the amount of compensation and death benefits paid and to be paid to employees of plaintiff or their beneficiaries or to the State of Wisconsin, on account of the injuries and deaths caused by the accident of July 26, 1930; and that they were also notified that defendant would deduct from the agreed amounts of settlements made on behalf of the railroad company the amount of compensation paid or to be paid by defendant to the persons with whom such settlements should be made.

The motion further admitted that subsequently plaintiff, defendant and the railroad company agreed that Lila Griffin was beneficially interested in a cause of action against the railroad company on account of the death of Walter Griffin; that she was entitled to receive one third of the net recovery made; that the

railroad company could not successfully defend any action brought by her and that it was to the mutual benefit of all parties concerned to settle her claim for $7500; that defendant then offered her $7500 in settlement of her claim against the railroad company; that the offer was accepted and January 25, 1931, she petitioned the Industrial Commission of Wisconsin to approve the settlement; whereupon, after due notice to plaintiff and the railroad company, February 11, 1931, the industrial commission entered an order wherein it was recited that Lila Griffin's claim had been compromised for $7500, and that $2500 of such settlement money was to be paid to her, and the order approved the settlement; that February 19, 1931, she was paid $2500 in cash by defendant, upon execution by her of full releases to the railroad company, and in the releases she expressly acknowledged that $5000 of the settlement money of $7500 belonged to and was the property of defendant; and that in effect defendant settled her cause of action against the railroad company for $7500.

It also admitted that other employees of plaintiff injured in the accident, as well as the alleged widow of Charles Williams, severally filed petitions with the Industrial Commission of Wisconsin for award to them of compensation or death benefits, and that defendant settled all of the claims with the knowledge and approval of plaintiff and the railroad company, with the exception of the claim of the alleged widow of Charles Williams, which was disallowed by the industrial commission; that these other persons also severally made demands upon the railroad company for payment to them of common law damages alleged to have been sustained by them on account of said accident; that all such claims were referred to defendant as the insurer of the railroad company's public liability; that plaintiff and the railroad company demanded

that defendant settle or defend all such claims; that plaintiff, defendant and the railroad company evaluated all other claims made against the railroad company by persons injured and agreed that defendant should settle such claims for the amounts thus fixed, if it should prove possible to do so; that defendant thereafter settled the claims of such injured persons by payment to them of the sums of money which plaintiff, defendant and the railroad company had agreed should be paid.

The following schedule, while not properly a part of the record, is exhibited by defendant on page 18 of its brief and is adopted by us as a convenient method of indicating the alleged amount of settlements of common law claims against the railroad company; cash actually received by each claimant on his or her common law claim; the amount of compensation paid by defendant to all injured employees, except the two whose claims are involved in this proceeding, beneficiaries of the two employees who were killed, or the State of Wisconsin.

Employee	"Amount of settlement of Common Law claim against Chicago and North Western Railway Company	Amount actually paid to claimant in settlement of Common Law claim	Amount paid to claimant in satisfaction of compensation award or settlement
Walter Griffin	$7,500.00	$2,500.00	$6,000.00
Charles Williams (Paid to administratrix qualified in Cook County, Illinois)	500.00	500.00	

that defendant notify or defend all such claims; that plaintiff, defendant and the railroad company evidenced all other claims made against the railroad company by persons injured and agreed that defendant should notify such claimants for the amounts thus filed; if it should prove possible to do so; that defendant therefore settled the claims of such injured persons by payments to them of the sums of money which plaintiff, defendant and the railroad company had agreed should be paid.

The Pilcher Schedule, which has previously a part of the record, is exhibited by defendant on page 18 of its brief and is analyzed by us in a convenient method of tabulating the minutes number of settlements at reasons for claims against the railroad company; such material presented by each claimant as bills or bar reasons for claims; the amount of compensation paid by defendant to all injured employees, showing the ten whose claims are involved in this proceeding, description of the one employee who was killed, or the date of disaster.

Employee	Reasons of settlement of Cause for claim against Chicago and North Western Railroad Company	Amount actually paid to claimant in settlement of reasons for claim	Reason actually paid to claimant in settlement of the policies of railroad companies in settlement
Walter Martin	$7,800.00	$5,800.00	$6,000.00
Charles Villione (Suit to determine constitutionality filed in Cook County)			
Illegal	$500.00	$0.00	

(Paid to State of Wisconsin as required by sub-paragraph 3 of Sec. 102.29 of the Wisconsin Statutes)			1,600.00
Isaac Alexander	1,000.00	600.00	400.00
Alexander Bronkala	7,500.00	2000.00	7,169.15
Michael Infalt	1,400.00	986.35	413.65
Total	$17,900.00	$6,586.35	$11,582.80"

Defendant contends that, by the terms of the public liability policy of insurance declared on, its liability is limited to $20,000 for any one accident; that it has paid on account of its liability and in accordance with the terms of the policy $19,500, in settlement of claims made prior to the demand which is the basis of the instant action; that the sum so paid by defendant reduced its liability to plaintiff under the policy by the amount paid and it was thereby discharged of liability to the assured except as to $500.

Defendant's theory is that it should be allowed a credit against its liability on the public liability insurance policy of all the separate amounts appearing in the first column of the above schedule and the $1600 paid by it to the State of Wisconsin; that its payment of $2500 to Lila Griffin was on the basis of a settlement of her common law action against the railroad company of $7500, she being entitled to receive only one third of the amount of the settlement under the law of Wisconsin, because of the compensation payments made to her by defendant, and that defendant was entitled to a credit against its liability on the indemnity policy of the other two thirds of the settlement figure or $5000, even though only $2500 was actually paid in the settlement of this claim; that it allowed itself credit on the public liability insurance policy

Paid in Case of Bankruptcy or Proceeding by virtue Paragraph 3 of Sec. 10(1)(b) of the Winnipeg Statutes)			1,000.00
Total Liability	1,000.00	800.00	800.00
Assessor Surplus	7,500.00	2000.00	7,500.00
Highest Total	1,000.00	800.00	800.00
Total	$17,500.00	$4,800.00	$17,100.00

Defendant contends that, by the terms of the policy liability policy of Insurance Company, its liability is limited to $1,000.00 for any one accident when it has paid an amount of its liability and to maintain with the terms of the policy (Exhibit "A") notwithstanding of claims made prior to the amount which is the basis of the instant action; that he can no longer by defendants evidence the liability is potential under the policy by the amount paid and if any thereby diminished of liability to the amount always as to $800.

Defendant's theory is that it should be allowed a credit against its liability on the public liability insurance policy of all the separate amounts appearing in the first column of the above schedule and the $1000 paid by it to the Bank of Montreal that the payment of $1000 to Julia Dyrkiw was on the basis of a settlement of her common law action against the railway company of $7500, she being entitled to receive only one third of the amount of the settlement under the Law of Contract, because of the compensation payments made to her by defendant, and that defendant was entitled to a credit against its liability on the insurance policy of the other two thirds of the settlement figure or $5000, even though only $800 was actually paid to the settlement of this claim; that it allowed itself credit on the public liability insurance policy

in connection with the claims of Isaac Alexander, Alexander Brankala and Michael Infalt, in the same manner and by the same method of taking credit as it did in the settlement of the case of Lila Griffin; and that, inasmuch as it was required to pay to the State of Wisconsin under the Wisconsin Workmen's Compensation act $1600 in the case of Charles Williams, it was entitled to an allowance or credit of $1600 against its liability on the public liability insurance policy under sub-sec. 2 of sec. 102.29 of the Wisconsin statutes of 1929, which provides that an insurer who is required to pay any money into the state fund under that section, shall have a right of action to recover back the money so paid against a third person whose negligence has made the payment necessary.

Plaintiff's theory is that defendant contracted to indemnify it against loss from certain casualties enumerated in the written contract of insurance wherein it was the assured; that the policy was effective as the contract of the parties at the time of an accident which resulted in plaintiff expending $7500 in the settlement of claims of persons injured, and that the policy embraced the loss so incurred both as to the character of the casualty and the amount necessarily expended in the settlement of the resulting claims. It also contends that the policy of insurance was without limitation as to defendant's liability for the particular claims involved, as held by the trial court, and asserts that even though the policy of insurance is construed and interpreted to limit defendant's liability to $20,000 for any one accident for the character of claims involved in this cause, it would still be liable inasmuch as it had previously discharged its liability under the policy to the extent of but $6,585.35.

The record discloses that the trial judge in sustaining

plaintiff's motion to strike defendant's second amended affidavit of merits did so on the theory that, under the indorsements contained in the rider attached to the policy of insurance, defendant assumed unlimited liability for the injury or death of plaintiff's employees, due to the railroad company's negligence, and therefore the affidavit of merits presented no defense.

The court indicated that its interpretation of the policy as being unlimited in this regard was based principally, at least, on the use of the language "as above stated" in the following paragraph of the rider:

"Nothing herein contained shall vary, alter or extend any provision or condition of the policy other than as above stated."

This clause followed a recital that plaintiff, the assured under the original policy, had assumed certain liabilities of the railroad company, under an agreement between the railroad company and it, in pursuance of its contract to build the elevator for the railroad. That part of the agreement with the railroad company pertinent to this inquiry is as follows:

"The contractor (plaintiff) agrees to indemnify and save harmless the railroad company * * * from all loss and expense arising or growing out of any injury to any employee of the contractor while on the premises of the railroad company (except while riding upon regular passenger trains as a passenger), however such injury may be caused, and without reference to negligence or contributory negligence; * * *"

And this language immediately followed:

"It is hereby understood and agreed that this policy shall extend to cover such assumed liability."

We are unable to discover from a careful examination of all of the terms of the rider, considered in connection with the provisions of the original policy, and of the declarations attached thereto, and by the terms of the policy made a part thereof, and applying the principle that reason should govern the interpretation and construction of insurance policies as

plaintiff's motion to strike defendant's issues asserted affirmative defenses, all go on the theory that, since the independent contractor is the right defendant in the policy of insurance, extension beyond limited liability for the injury or death of plaintiff's employees, due to the railroad company's negligence, and therefore the affirmative defenses of merits presented on defense.

The court believes that the interpretation of the policy as being violated in this respect was based principally, at least, on the use of the language "employee exclusion" in the following paragraph of the rider:

"Excluding herein mentioned small crew, rider or other any provision or condition of the policy other than as shall be specifically

This clause followed a typical coal production, the assumed under the original policy, but assumed certain liabilities of the railroad company, under an agreement between the railroad company and it, in pursuance of its contract to build the elevator for the railroad. That part of the agreement with the railroad company pertinent to this inquiry is as follows:

"The contractor indemnifies agrees to indemnify and save harmless the railroad company [illegible] from all loss and expense arising or growing out of any injury to any employee of the contractor while on the premises of the railroad company (except while riding upon regular passenger trains on a passenger ticket) whether such injury may be caused, and without reference to negligence or contributory negligence."

Yet this language immediately follows:

"It is hereby understood and agreed that this policy shall extend to cover such assumed liability."

It can easily be answer from a careful examination of all of the terms of the rider, considered in connection with the provisions of the original policy, and of the contractions assumed therein, and by the terms of the policy when a just liberal, and explicit in principle that issue should govern the interpretation and construction of insurance policies so

well as other contracts, that the provisions of the rider and the original policy are in conflict, ambiguous, inconsistent or irreconcilable.

The original policy in plain terms places a limit of $20,000 on defendant's liability "for any one accident, injuring more than one person." The indorsement or rider simply provides that the policy, with the same limitation, shall extend to cover the railroad's company's liability assumed by plaintiff. It specifies that "nothing herein contained shall vary, alter or extend any provision or condition of the policy other than as above stated." The only variation, alteration or extension as above stated was the extension of the policy with a $20,000 liability limitation to the railroad company's liability assumed by plaintiff.

It is true that plaintiff's indemnifying agreement with the railroad company was without monetary limit, but a fair interpretation of the rider and the policy compels the conclusion that defendant did not assume the full contractual risk of plaintiff, but rather agreed to the extension of its $20,000 limited indemnity to a new species of contingent liability. That the parties so intended, and that plaintiff's counsel so interpreted the insurance policy with its rider attached, is evidenced by the following allegation of plaintiff's declaration:

"It was further provided in said policy P-45543, that the liability of the defendant for losses sustained under the provisions of said policy was by the terms of said policy for any one accident injuring more than one person limited to the sum of Twenty Thousand Dollars ($20,000.00), but this limitation shall not apply to the cost of defense of claims or suits, court costs, interest accruing upon any judgment or the cost of immediate surgical relief as provided for in said policy."

Plaintiff's counsel, in urging his motion to strike the affidavit of defense, at no time during the course of his extended argument contended, or even intimated, that the policy with the

well as other contracts, that the provisions of the rider and the original policy are in conflict, contradictory, inconsistent or irreconcilable.

The original policy in plain terms places a limit of $50,000 on defendant's liability "for any one accident, injuring more than one person." The insurance on rider simply provides that the policy, with the same limitations, shall extend to cover the railroad's company's liability assumed by plaintiff. It specifies that "nothing herein contained shall vary, alter or extend any provision or condition of the policy other than as stated." The only variation, alteration or extension so stated was the extension of the policy with a $50,000 liability limitation to the railroad company's liability assumed by plaintiff.

It is true that plaintiff's indemnifying agreement with the railroad company was without monetary limit, but a fair interpretation of the rider and the policy compels the conclusion that defendant did not assume the full contractual risk of plaintiff, but rather agreed to the extension of its $50,000 limited indemnity to a new class or coverage of liability. Thus the parties to the contract, and that plaintiff's counsel so interpreted the insurance policy with its rider attached, is evidenced by the following allegations of plaintiff's pleadings:

> "It was further provided in said policy P-55021, that the liability of the company for losses sustained under the provisions of said policy was by the terms of said policy for any one accident injuring more than one person limited to the sum of Twenty Thousand Dollars ($20,000.00), but this limitation shall not apply to the case of actions or claims or suits, court costs, interest accruing upon any judgment or the cost of insurance employed right to provide for in said policy."

Plaintiff's counsel, in urging his motion to strike the affirmative defense, at no time quoting the course of his contended argument concluded, or even intimated, that the policy with the

rider attached was other than a $20,000 limitation liability policy.

Not until the trial court, under a misapprehension as to the proper interpretation of the policy, suggested that defendant's liability for the class and character of claims involved in this cause was unlimited, did counsel for plaintiff urge the court to hold that the liability of defendant was unlimited. Before the trial judge suggested the possible unlimited liability of defendant, we find plaintiff's learned counsel during the course of his argument on his motion to strike, stating at page 27 of the bill of exceptions "demand was then made upon the Indemnity Insurance Company of North America to reimburse the plaintiff, the John S. Metcalf Company, under its public liability insurance policy for $20,000, to reimburse them for the moneys paid in effecting the settlement of these claims * * *;" at page 28, "they wrote a Workmen's Compensation Policy of an unlimited amount to this plaintiff, the Metcalf Company covering this job; they wrote a $20,000 Public Liability Insurance Policy to this plaintiff on this job * * *;" at page 40, "this same company issued a public liability policy for $20,000 issued by this same company to this plaintiff * * *;" and also at page 40, "Mr. Shannert Within the limits of the policy, - in other words we make the Chicago and North Western Railway Company additionally insured under the policy - Mr. Tracy (counsel for plaintiff) $20,000;" and again at page 59, "they paid out $6,586, according to the figures under the public liability and they have a liability of $20,000."

There can be no doubt that it was the intention of the parties to enter into a contract for public liability insurance with a $20,000 limitation for any one accident injuring more than one person. Plaintiff's counsel recognized and construed it as a policy with a $20,000 limitation, and it was his duty to assist

which attached more value than a $50,000 limitation liability policy.

The world's total insurance premiums amounted to approximately as in the proper interpretation of the policy, suggested that defendant's liability for the alleged non-delivery of stolen jewelers in this cause was unlimited, did concede the plaintiff's claim was entitled to hold that the liability of defendant was unlimited. Counsel the trial judge suggested the possible ambiguous liability of defendant, he find plaintiff's learned counsel during the course of his argument on his motion to strike, reading at page 27 of the trial of counsel was then made aware the insurance premiums amounted to $[illegible] the plaintiff, the date of [illegible] under the policy for $50,000, to reimburse them for the amount paid in attaching the settlement of these claims " " " at page 28, "they made a defendant's computation relied of an unlimited amount in this plaintiff, the Detroit company carrying this jewelry they made a $50,000 liability insurance policy on this jewelry " " " at page 29, "this case involved a policy liability for $50,000 issued by this same company to this jewelry " " " and also at page 29, "Insurance within the limits of the policy" - he also cited to me the Shields and Smith "Insurance" company unlimitedly insured under the policy - $5, Fraud insured for plaintiff) $50,000" and again at page 30, "they paid up $50,000" according to the figures under the policy liability and they have a liability of $50,000."

There can be no doubt that it was the intention of the parties to enter into a contract for policy liability insurance with a $50,000 limitation for any and all loss, injury and damage. Plaintiff's counsel strenuously and unavailing in an

a policy with a $50,000 limitation, and it was his duty to notify

the trial court in reaching a proper conclusion and a correct interpretation of the insurance contract, rather than to mislead and encourage the court to an improper conclusion and incorrect interpretation of the policy.

Two propositions of law were submitted to the trial court, and its holding that under the terms of the rider attached to the policy in question the defendant assumed liability without limit, as well as its holding that the rider providing for unlimited public liability under the court's interpretation of the policy, was not void by reason of sec. 8 of the act concerning casualty insurance, as amended, were clearly erroneous.

Defendant insists that if it issued an unlimited public liability insurance policy its action would be both ultra vires and in violation of the provisions of the Casualty Insurance act of this state and therefore void, and cites many cases outlining the rules and principles that should guide and govern the proper interpretation of insurance policies, but by reason of the views already expressed by us we deem it unnecessary to discuss these propositions.

If the erroneous interpretation of the trial judge, that the defendant's liability under the policy was unlimited, was the only point to be considered on this appeal it would be our duty to reverse and remand the cause, but plaintiff insists that even though the trial court in sustaining the motion to strike, predicated its judgment in this cause on an erroneous theory as to the law, still the judgment should be sustained if this court finds any legal warrant in the record justifying such action.

Plaintiff contends that, conceding that the policy is limited to $20,000 liability, defendant has not discharged its

liability to the "100 liability" endorsement was not sufficient the
Plaintiff contends that, considering that the policy is
silent, there must be a judgment in the record justifying such
action.

The trial court, in interpreting the motion to
dismiss, as to the law, still the judgment should be sustained if
there is no law, still the judgment should be sustained if
the trial court is correct in the result, but physically include
the only point to be considered on this appeal, it would be
our duty to examine and construe the policy, but physically include
the endorsement of the trial court in interpreting the motion to
dismiss, predicated its judgment in this cause on an erroneous
ruling, the judgment of the trial court in sustaining the motion to
dismiss, and the holding that under the terms of the other endorsement
to the policy in question the defendant assumed liability without
limit, as well as the holding that the other provisions for un-
limited public liability under the insurer's interpretation of the
policy, was not void for vague or uncertainty, & of the not constituting
security insurance, as contended, were clearly erroneous.

Defendant insists that if it issued an unlimited public
liability insurance policy the action would be such <u>prima facie</u>
and in violation of the provisions of the security insurance act
of this state and therefore void, and since many cases construing
the facts and principles that should guide and govern the proper
interpretation of insurance policies, but by reason of the views
already expressed by us we deem it unnecessary to discuss those
decisions.

In the erroneous interpretation of the trial judge,
that the defendant's liability under the policy was unlimited,
was the only point to be considered on this appeal, it would be
our duty to examine and construe the policy, but physically include
the endorsement of the trial court in interpreting the motion to
dismiss, predicated its judgment in this cause on an erroneous
ruling, the judgment of the trial court in sustaining the motion to
dismiss, and the holding that under the terms of the other endorsement
to the policy in question the defendant assumed liability without
limit, as well as the holding that the other provisions for un-
limited public liability under the insurer's interpretation of the
policy, was not void for vague or uncertainty, & of the not constituting
security insurance, as contended, were clearly erroneous.

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and in violation of the provisions of the security insurance act
of this state and therefore void, and since many cases construing
the facts and principles that should guide and govern the proper
interpretation of insurance policies, but by reason of the views
already expressed by us we deem it unnecessary to discuss those
decisions.

liability under the policy to that amount but only for $6,586.35, the amount actually paid out by it in cash in settlement of the various claims against the railroad company as indicated on the schedule, supra.

Defendant insists that under the terms of its Workmen's Compensation Policy issued to plaintiff it was subrogated, by reason of its various payments of compensation to the employees injured as a result of the accident in question and to the beneficiaries of those who were killed, to the rights of plaintiff or its employees or employees' beneficiaries against the railroad company because of its negligence in causing the injury and death of plaintiff's employees. Subrogation to the rights of plaintiff, or its employees, under its Workmen's Compensation Policy issued to plaintiff would not avail it as against the railroad company inasmuch as it had agreed to indemnify and save harmless plaintiff and the railroad company against just such claims under its public liability policy. It would be a legal impossibility for it to enforce such subrogated claims against the railroad company. In addition we are of the opinion that the subrogation clause of the Workmen's Compensation Policy contravenes the provision of the Wisconsin Workmen's Compensation act as to common insurers in force during the currency of that policy and is therefore void and of no effect as will be hereafter shown.

Sec. 102.29 of that act provides in part:

"(a) Except in those cases provided for in paragraph (b) of this subsection, the making of a lawful claim against an employer or compensation insurer for compensation under sections 102.03 to 102.34 for the injury or death of an employe shall operate as an assignment of any cause of action in tort which the employe or his personal representative may have against any other party for such injury or death; and such employer or insurer may enforce in their own name or names the liability of such other party for their benefit as their interests may appear. * * *"

It then goes on to provide that the assignee (whether insurer or employer) of whatever right of action the employee might

liability under the policy is that amount but only for [illegible], the amount actually paid out by it in each in settlement of the various claims against the national company or indemnes on the schedule, [illegible].

Defendant insists that under the terms of its workmen's compensation policy issued to plaintiff it was subrogated, by reason of its various payments if compensation to the employees injured as a result of the accident in question and to the beneficiaries of those who were killed, to the rights of plaintiff as the employee or employees' beneficiaries against the railroad company because of its negligence in causing the injury and death of plaintiff's employee. Subrogation to the rights of plaintiff, or its employees, under the carrier's compensation policy issued to plaintiff would not avail it as against the railroad company inasmuch as it had agreed to indemnify and save harmless plaintiff and the railroad company against just such claims under its policies liability policy. It would be a legal impossibility for it to enforce such subrogated claims against the railroad company. In addition we are of the opinion that the subrogation clause of the carrier's compensation policy contravenes the provision of the Kansas workmen's compensation act so to cause insurers in force during the currency of that policy and in therefore void and of no effect as will be hereafter shown.

Sec. 101-b of that act provides in part:

"(a) Except in cases where provision for is provided (b) of this subsection, the acceptance of a lawful claim against an employer or compensation insurer for compensation under provisions hereof to include for the injury or death of an employee shall operate as an assignment of any cause of action in favor which the employee or his personal representative may have against any other party for such injury or death and such employer or insurer may enforce in their behalf or in their name such claim or cause of action against such other party for such benefit as their interests may appear.

It then goes on to provide that the employee (whether insurer or employer) of whatever right of action the employee might

can sue or assume the liability of such other party for their benefit as their interests may appear. * * *"

have against third party wrongdoers must, in the event of recovery, pay to the employee or beneficiary any sum in excess of the compensation paid, but in any event at least one third of the net recovery.

Paragraph "b" of the same section containing the exceptions to the terms of paragraph "a" provides:

"(b) If the insurance carrier of the employer and of the third party shall be the same or if there is common control of the insurer of each, the insurance carrier of the employer shall promptly notify the parties in interest and the industrial commission of that fact; likewise, if the employer has assumed the liability of the third party he shall give similar notice; and, in default of such notice, any settlement with an injured employe or beneficiary shall be void."

Reference to the last column of defendant's schedule of payments, heretofore set forth, confirms its payment of compensation under its compensation policy and the Workmen's Compensation act of Wisconsin of $13,982.80 to three injured employees, the widow of an employee, who died as a result of the accident in question, and $1600 to the State of Wisconsin as provided by the statute in the case of Charles Williams, who was killed in the accident and left no surviving widow or children.

Reference to the second column of the schedule shows that defendant on its public liability policy indemnifying plaintiff because of the railroad company's liability, actually paid $6,586.35 to the same four claimants in settlement of their common law claims against the railroad company for its negligence in causing the accident, and $500 to the administratrix of the estate of Charles Williams. Leola Williams filed a claim for compensation before the Industrial Commission of the State of Wisconsin, but it was disallowed on the ground that she was not the widow of Charles Williams, and she later qualified as administratrix of his estate in the Probate court of Cook county and asserted a common

have violated their duty of confidentiality owed, if the result of disclosure, but to the employee not behaviourally any use in proving of the compensation point, but is by weight of intent and intent of the act themselves.

Returning to the case under consideration regarding the application to the issues of paragraph "B" provided:

"(B) If the Commission satisfied of the employee that of the duty owed, or if there is a strong general of the issues of such, the Commission consider of the employee should primarily notify the parties to interest and the Industrial Commission of that fact fully. If the employee has lessened the liability of the total duty to about five months wages, or default of such notice, the existence with an injured employee be unsatisfactory should be void."

Reference to the last column of Schedule's schedule of payments, investigation and facts, conditions the payment of compensation under the compensation policy and the Schedule's compensation and of classes of it, which is those injuries employees, the wages of an employee, the time as a result of the accident is quarters, and first of the date of incapacity as provided by the statute in the case of Section "Illness, who was killed in the accident and left no surviving widow or children.

Reference is the second column of the schedule shows that payments on the period liability policy incapacity plus- full benefit of the maximum company's liability, namely $4,000.00 in the case that claimant is entitled of their average line claims against the national employer for the negligence in course the "work/", and that in the substantiation of the claims of Charles Illidge. Again Illidge filed a claim for compensation before the Industrial Commission of the State of Louisiana, but it was dismissed on the ground that was not the widow of Charles Illidge, and the latter qualified as administrator of him subject to the Plaintiff report of that claim, and asserted a claim against the Plaintiff.

law claim against the railroad company which was settled by defendant for $500.

Reference to the first column of the schedule discloses that although it actually paid Lila Griffin only $2500 in settlement of her claim against the railroad company for the death of her husband, defendant allowed itself a credit of $7500 against its $20,000 liability on its liability indemnity policy, on the theory that it was subrogated to a two thirds beneficial interest in claimant's settlement of her claim against the railroad company because of its payment of $6000 compensation to her under its workmen's compensation policy. By applying the provisions of par. "a", of sec. 102.29 of the Wisconsin compensation act, to the settlement of each of the claims, it allows itself credit against its $20,000 liability on its indemnity policy for various amounts paid by it in compensation under its separate compensation policy issued to plaintiff. It thus claims under the first column of its schedule to have discharged $17,900 of its $20,000 liability on the indemnity policy issued to plaintiff, when in fact it only paid out in cash $6,586.35 on that policy as shown in the second column.

Defendant also claims a credit and a further discharge of its indemnity liability to the extent of $1600 by reason of its payment of that amount to the State of Wisconsin under the terms of its compensation policy and the provisions of the workmen's compensation act. Accordingly it insists that its $20,000 liability, under the indemnity policy, has been reduced and discharged to the extent of $19,500 by its settlement and satisfaction of claims presented prior to the claims involved in the instant case.

Defendant appears to have gone somewhat awry in its

Our state against the railroad company which was settled by decisions for 1900.

Reference to the first volume of the annuals discovers that minnesota is normally paid $2,000 dollars in accrued sums of her claim against the railroad company for the years of the Bankruptcy, referencing claims filedf a sum of $2000 against the $20,000 liability on the liability insurance policy, on the ground that it was undertaken in a few months preceding bankruptcy's settlement of her claim against the railroad company because of the payment of being undertaken in our years the vendee's conservation policy. By applying the provisions of part "a", of sect 102-32 of the Wisconsin conservation act, in the settlement of such of the claims, it allows itself which amounts to 200,000 liability on the insurance policy for workers compensation paid by it in conservation under its separate conservation policy issued on January. It then claims under the first section of its schedule to have discharged $17,000 of its $20,000 liability on the insurance policy issued to plaintiff, when in fact it only paid out in such $6,980.32 on that policy in excess in the amount claimed.

Defendant also claims a credit and a further discharge of the insurance liability in the amount of $2000 by reason of the payment of the damages of item amount to the state of Wisconsin under the terms of the conservation policy and the provisions of the underwriter's conservation act. Contrary to decision that the $20,000 liability under the insurance policy, has been reduced and discharged to the amount of $17,000 by the settlement and satisfaction of claims processed prior to the claims involved in the instant suit.

Defendant claims to have some amount such in its

theory on the settlement of the claim of Alexander Bronkala. It alleged in its affidavit of merits that after it had paid treatment and hospitalization fees of $942.65 in his behalf, and paid him as compensation $562.50, "Bronkala, plaintiff, defendant and the Chicago and North Western Railway Company appeared either in person or by their respective attorneys before the Industrial Commission of Wisconsin and stipulated and agreed that the sum of $7,500, in addition to the sums previously paid by defendant for medical treatment and as compensation, should be paid to Alexander Bronkala on account of his claim under the Workmen's Compensation Act of Wisconsin, and on account of the liability of the Chicago and North Western Railway Company, the third party wrongdoer. It was further agreed that $5,500 was to be paid on account of Alexander Bronkala's claim for compensation and the residue of $2000 should be paid to him in a lump sum on account of his claim against the Chicago and North Western Railway." It also alleged that $5000 of the $7500 settlement beneficially belonged to it under the subrogation provision of the workmen's compensation act and that in effect it paid on account of the public liability policy $9,169.15. The specific terms of the settlement of the Bronkala claim for $7500, $5500 for compensation and $2000 for the railroad company's liability, apparently caused defendant to deviate from its method of figuring the allotment of charges to the respective policies as indicated by the schedule. The Wisconsin compensation act provides that in any event in case of liability, settlement or recovery, because of the act of the third party wrongdoer, the claimant is entitled to one third of same. Bronkala was not paid one third of the $7500 charged against the liability policy on the schedule. Because the specific terms of the settlement with him provided that he was to receive $2000 on

injury on the settlement of the claim of Hammond Brandala.
It alleged in the affidavit of merits that after it had paid
premiums and hospitalization fees of $945.60 in his behalf,
and paid $48.40 uncompensated insurance, "therefore, plaintiff,
defendant and the Chicago and Tarik Western Railway Company
separately elsewhere in person or by their respective attorneys before
the Industrial Commission of Illinois, stipulated and agreed that
and
the sum of $7,000, in addition to the sums previously paid by
defendant for medical services and or compensation, should be
paid to Hammond Brandala on account of his claim under the
Workmen's Compensation Act of Illinois, and on account of the
liability of the Chicago and Tarik Western Railway Company, the
third party wrongdoer." It was further agreed that $2,800 was in
be paid on account of Hammond Brandala's claim for compensation
and the sum of $2,000 should be paid to him in a lump sum on
account of his claim against the Chicago and Tarik Western Railway.
It also alleged that $2000 of the $7000 settlement proceeds
belonged to it under the subrogation provision of the workmen's
compensation act and that in effect it paid on account of the public
liability policy $7,048.40. The specific sums of the settlement
of the Brandala claim for $7000, $2000 for compensation and $2000
for the Railroad company's liability, expressly reserved defendant
to contest the method of figuring the allowance of charges
in the respective policies as imposed by the schedule. The
workmen compensation act provides that in any event in case of
liability, assignment or recovery, because of the act of the third
party wrongdoer, the claimant is entitled to one third of sums.
Brandala was not paid one third of the $7000 thereby reducing the
liability policy on the schedule. Because the specific terms of
the settlement with the provided that he was to receive $2000 on

account of the railroad company's liability it undoubtedly was difficult to adjust the terms of that particular settlement to defendant's theory.

It will be noted that par. "a" of sec. 102.29 of the Wisconsin Workmen's Compensation act, providing that "the making of a lawful claim against an employer or compensation insurer for the injury or death of an employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death," particularly excepts those included in par. "b" from this provision of the statute.

The pertinent portions of par. "b" are that, "if the insurer carrier of the employer and of the third party shall be the same, * * * the insurance carrier of the employer shall promptly notify the parties in interest and the Industrial Commission of the fact; * * * and in default of such notice any settlement with an injured employee or beneficiary shall be void." The defendant notified the parties in interest and the Industrial Commission that it was a common insurer.

It is readily apparent why such a claim could not be automatically assigned to a common insurer. Such an assignment would impose on the common insurer a conflict of interests. Under its liability policy it was obligated to indemnify and save plaintiff harmless for liability of itself or the railroad company. The legislators visioned fraud under any such arrangement and therefore provided that any settlement made by a common insurer with injured employee or beneficiaries in the absence of notice shall be void.

Plaintiff urges that since this cause falls within the provisions of subdivision 1 (b) of sec. 102.29 of the Wisconsin

undoubtedly

evident at the trial employer's liability is not difficult to adjust the issues of that particular statement to defendant's theory.

It will be noted that plaintiff "A" at bar, 20,00 of the statement relating's employer's negligence was, providing that "the minimum wage of $10.00 a week" or employer or employees insurer for the injury or death of an employee which results in the minimum wage of $10.00 a week in this case the employer or his insurer, liability and then only if it was clear that by such injury or death" particularly because there involved in per. "A" from his position at the station.

The pertinent portions of para. "B" are that, "If the insurer carrier of the employer and of the third party shall be the same, * * * the insurance carrier of the employer shall promptly notify the parties in interest and the industrial commission of the fact; * * and in default of such notice any settlement with an injured employee or beneficiary shall be void." The statutes notifies the parties in interest and the industrial commission that it was a common insurer.

It is usually apparent why such a claim could not be taken directly against in a common insurer. Such an assignment would impose on the common insurer a conflict of interests. Under its liability policy it was obligated to indemnify and save plaintiff harmless for liability of itself or the railroad company. The indemnitee relinquished found under any such arrangement and therefore provided that any settlement made by a common insurer with injured employee or beneficiaries in the absence of notice should be void.

Plaintiff urges that since this cause falls within the provisions of subdivision 2 [b] of sec. 340-12 of the Wisconsin

Compensation Act, employees who made settlements with the railroad company were not required to reimburse defendant for money it had paid to them under its compensation policy. The legislature of that state did not expressly provide in subdivision 1 (b) for such reimbursement, but it is urged by defendant that it was the intention of the legislature that pars. "a" and "b" should be construed together, and that a correct interpretation of those subdivisions so construed must necessarily lead to the conclusion that compensation beneficiaries, who subsequently make common law recoveries, must repay the insurer such sums as they have received as compensation.

Defendant cites Cottrill v. Pinkerton, 248 N. Y. 124, in support of its last contention. In that case there was a plea in abatement based on the allegation that at the time of her alleged injuries the plaintiff was in the employ of the Equitable Reserve Association, and was subject to the Workmen's Compensation Law of Wisconsin; that plaintiff had received from her employer compensation on account of said injuries, and that, by reason thereof, her alleged cause of action against the defendant was assigned to her employer; that the plaintiff did not demand that the employer pursue its remedy against the defendant, and that, by reason thereof, the plaintiff was not a proper party and had no cause of action against the defendant.

In its opinion the court said at pp. 125 and 126:

"1st. That because the insurance carrier of the employer, Equitable Reserve Association and of the third party, L. J. Pinkerton are the same, to-wit, The Phoenix Indemnity Company, the case is ruled by paragraphs (a) and (b) of subsection (1) of Sect. 102.29 Wis. Stats. of 1919, and no assignment of plaintiff's cause of action against the defendant resulted from the making of any claims for compensation for her said injuries by plaintiff from her said employer, or from her receipt and acceptance of said money therefor, or from her acceptance of said hospital and medical service.

"(1) The ruling on the plea in abatement by the trial court was in accordance with the proper interpretation of section 102.29 Stat. of 1929. By that section exception is created to the

[illegible] but, employees who had worked with the [illegible] company were not required to [illegible] for which it had paid to show under its compensation policy. The legislature of that state did not expressly provide in subdivision 1 (c) for such reimbursement, but it is argued by defendant that it was the intention of the legislature that para. "a" and "b" should be exclusive [illegible], and that a mutual indemnitee of [illegible] subdivisions of section [illegible] that compensation benefitsbution, who subsequently sue [illegible] the insurance, must repay the insurer such sums as they have received as compensation.

Defendant cites MATHEWS v. [illegible], 112 N. Y. 100, in support of its last contention. In that case there was a plan in existence based on the allegation that at the time of her alleged injuries the plaintiff was in the employ of the municipal improve ment association, and was subject to the company's compensation law at the time; that plaintiff has received from her employer compensation on account of such injuries, and that, by reason thereof, her alleged cause of action against the defendant was assigned to her employer; that the plaintiff did not assume that the employer pursue its remedy against the defendant, and that, by reason thereof, the plaintiff was not a proper party and had no cause of action against the defendant.

In its opinion the court said at pp. 108 and 109:

"14. That assumes the insurance carrier of the employer, [illegible] statutes constitutes and of the third party, b. c. insurance are the same, legally. The Phoenix Indemnity company, the case in point by stipulation, [illegible] and (2) of section 1 (c) of the [illegible] [illegible] of [illegible] and to reimbursement of plaintiff's [illegible] of action against the defendant, required from the mulling of any claims for compensation for her injuries by plaintiff from her said employer, or from her employer and a[illegible] of said Mutual Indemnity Insurance, or from her insurance of [illegible] medical service.

"(2) The relief on the plan is obstructed by the fact that was in accordance with the proper interpretation of section 1(c)(3) thereof, of 1909. By that section recovery is stated to the

rule of automatic assignment to the employer of a claim for damages arising out of the injury of an employee by the negligence of a third party, where there has been an acceptance of compensation by the employee. This exception is plainly described by the language 'except in those cases provided for in paragraph (b) of this subsection, the making of a lawful claim against an employer * * * shall operate as an assignment. * * *' Subdivision 1 (b) of that section reads in part: 'If the insurance carrier of the employer and of the third party shall be the same or if there is common control of the insurer of each. * * *' This is the only class of cases provided for in paragraph (b), and reading the regulations of assignment under the Compensation Act together leaves no room for doubting that no assignment occurs where the third party and the employer have a community interest in the final result which on the face, appears and may be truly said to be antagonistic to the employee. Nothing that the respondent did with relation to compensation under the Workmen's Compensation Act amounted to an assignment of her claim, and her acts do not in any way interfere with her maintaining her action.

"Her employer's office was at Neenah. She lived at Oshkosh. She was permitted to be one half hour late in the morning in arriving at Neenah, but the evidence is that she was expected to make that half hour up during the day. The bus on which she usually traveled from Oshkosh to Neenah arrived at Neenah at 8:30 a. m. The accident occurred while she was on her way to work and before that hour in the morning. She was not paid for the time consumed in traveling from Oshkosh to Neenah, and it is doubtful if any circumstances are present which placed her at the time of the accident in a position where she may be said to have been performing duties arising out of her employment and incidental thereto, but this becomes of no consequence in this case, as even if she did receive compensation under the Workmen's Compensation Act, it does not bar her right to maintain this action; there was an offer to return and proper credits can be given for such advances as were made. As pointed out, the law itself provides against an assignment by reason of acts of the respondent under the circumstances because of the presence of a common insurer of the employer and the negligent defendant."

This is the only case so far as we are advised or have been able to learn that interprets sec. 102.29 of the Wisconsin Workmen's Compensation act. Far from importing an obligation on the part of beneficiaries under that act, who subsequently make common law recoveries, to repay to a common insurer the money received as compensation, the court while it did not specifically pass on the question involved here did say, after quoting the germane portions of subdivisions 1 (a) and 1 (b):

"This is the only class of cases provided for in par. (b), and, reading the regulations of assignment under the Compensation Act together, leaves no room for doubting that no assignment occurs where a third party and the employer have a community interest in the final result, which on the face, appears and may be truly stated to be antagonistic to an employee."

The interest of a common insurer of the employer and a third party wrongdoer in any case is not only presumed to be, but is bound to be antagonistic to the injured employee, and this certain conflict of interest undoubtedly prompted and inspired the legislature of Wisconsin to except common insurers from provisions of the compensation act, under which the making of a lawful claim under the act against a compensation insurer for injury or death of an employee operates as an assignment of any cause of action in tort against any other party for such injury or death.

It is difficult to understand or appreciate why its interest as common insurer of the employer and third party wrongdoer, declared by the law to be so antagonistic to the employee as to preclude an assignment to it of an injured employee's right of action against the third party wrongdoer, does not persist with the same degree of antagonism in negotiation for the settlement of the employees' claims against the third party wrongdoer as to preclude its participation in the final result of any such settlement as a beneficial owner.

Defendant's counsel in his reply brief declares that the Cottrill case, supra, is in all essential respects similar to the case at bar and particularly calls attention to the following language of that opinion:

"She was not paid for the time consumed in traveling from Oshkosh to Neenah, and it is doubtful if any circumstances are present which placed her at the time of the accident in a position where she may be said to have been performing duties arising out of her employment and incidental thereto, but this becomes of no consequence in this case as, even if she did receive compensation under the Workmen's Compensation Act, it does not bar her right to maintain this action - there was an offer to return and proper credits can be given for such advances as were made. As pointed out, the law itself provides against an assignment by reason of acts of the respondent under the circumstances because of the presence of a common insurer of the employer and the negligent defendant."

The interest of a common insurer of the employer and a third party wrongdoer in any case is not only presumed to be, but is found to be antagonistic to the injured employee, and this carries conflict of interest considerably further and imposes the imperative of treatment to ensure insurance fund protection of the insurrational kind, under which the making of a lawful claim under the act requires a compensation insurer for injury or death of an employee executive to be satisfied of any course of action in such matters and after payment for such injury or death.

It is difficult to understand or appreciate why the interest on common insurer of the employer and their party wrongdoer, described by the Act to be an antagonistic to the employee as to preclude an assignment to it of an injured employee's right of action against the third party wrongdoer, does not interfere with the same degree of antagonism in negotiation for the settlement of the employee's claim against the third party wrongdoer as to preclude the participation in the final result of any such settlement to a Doughtful power.

Tetrahaut's counsel in his brief contains that the Justice made, Murphy, in an all economical response similar to the case at bar and particularly calls attention to the following language of that opinion:

"The sum not paid for the time remained in arresting from Dunbark to Joseph, and it is doubtful if any attendance was paid against which claims his at the time of the accident in a position where one may be said to have been performing duties arising out of her employment and incidental thereto, but this doubt of be resolved in this case, and even if she did therein suggestion under the Workmen's Compensation Act, it does not for her right to maintain this action - there is no effect to bring the general liability for an injury for which employer is not liable. In Pulsion v. Ch, the Irish Privy Council on assignment by reason of duty of the tortfeasor under the circumstances between of the insurance of a common insurer of the employer and the employee dismissed."

Defendant's counsel insists that the expression in the opinion "there was an offer to return and proper credits can be given for such advances as were made" decisively sustains the position of defendant that, while the presence of a common insurer preserved to the plaintiff, Cottrill, her common law right of action against the third party wrongdoer, she was required by the judgment of the court in enforcing that liability to allow credit on the judgment entered for the aggregate of compensation payments previously made to her by the insurer.

We find nothing in the above quoted language or any other expression of the court in that opinion that affords any reasonable basis for defendant's counsel's deduction or conclusion. A careful reading and analysis of the opinion convinces us that the statement of the court "there was an offer to return and proper credits can be given for such advances as were made," was predicated on the court's conclusion that "it is doubtful if any circumstances are present which placed her at the time of the accident in a position where she may be said to have been performing duties arising out of her employment and incidental thereto." The court did not state compensation payments made. It said "such advances as were made." We are also convinced that when the court said "proper credits can be given for such advances as were made," the court referred to moneys mistakenly or inadvertently advanced under a misapprehension that Cottrill was injured during the course of her employment, and not to compensation payments rightfully and properly made in a case without the purview of the Wisconsin Workmen's Compensation Act.

Defendant contends that while it is legally impossible for it to acquire by assignment, and the statute excludes it from the provisions for automatic assignment of such claims, still it

Petersdorf's numerical analysis that the expressions in the opinion "There are no rules in science and society strictly one is right for some circumstances or vice versa" characterize the position of Aristotle, which the presence of a common thinker preferred to the platonist, therefore, has reason for right of action against the latter party complaint, nor was received by the judgment of the court in determining this invalidity in which case the judgment entered for the plaintiffs of compensation punitive damage particularly made in fact by the Counsel.

In this matching in the cases studies inequality or any other expression of the lawyer in that opinion that affects any remarkable merit for petitioner's counsel's solicitation or manipulation a matter involving and employed by the opinion concerning so that the statements of the court "There are no rules in science and society strictly can be given for such expressions as vice versa" was predicated on the court's conclusion that "It is doubtful if any circumstances are present which placed her at the time of the accident in a position where she may be held to have been participating with strictling her of her employment and individual interests." The court did not state compensation punitive made. It said "such expressions as vice versa." It was also concerned that upon the matter with "proper strictly can be given for such expressions as vice versa." The court referred to monopoly strictly or immaterially expressed under a misapprehension that therein was injured during the course of her employment, and for to compensation punitive strictly and properly made in a case without the purview of the Workmen's Compensation Act.

Petersdorf complained that while it is illegal impertinent for it be respond by employment, yet the statute requires it then the provisions for compensation assignment of such injuries, still it

must have a beneficial interest in the amounts recovered from the third party wrongdoer by employees or their beneficiaries when it has paid compensation to such employees or their beneficiaries under the terms of the Wisconsin Workmen's Compensation act.

Defendant's claimed discharge of its liability under its public liability policy issued to plaintiff is predicated on figures and bookkeeping, rather than actual payments made by it because of the railroad company's liability. It is precluded by the Wisconsin law from acquiring by assignment any legal right by reason of its payment of compensation on account of the injury or death of an employee, in or to any claim such employee or his beneficiaries may have against a third party wrongdoer because of its dual role of common insurer.

In our opinion the beneficial interest in the paper settlements or paper credits against its liability on its indemnity policy, which defendant seeks to assert, is not contemplated by the Workmen's Compensation act of the State of Wisconsin. We are clearly of the opinion that under the provisions of the act defendant is not justified in claiming discharge of its liability under its $20,000 indemnity policy issued to plaintiff, except as to the $6,586.35 actually paid to the respective claimants on behalf of plaintiff and the railroad company. The balance of its claim of discharged liability of the $20,000 indemnity policy is purely artificial. There remains a balance of undischarged liability on this policy more than sufficient to satisfy the judgment in this cause.

For the reasons indicated the judgment of the Superior court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

must have a beneficial interest in the underlying insurance from the third party viewpoint by implicit or their beneficiaries when it has paid compensation to such employees or their beneficiaries under the laws of the Illinois Industrial Commission's compensation rule.

Defendant's argument concerning the liability under the policy limited liability policy issued to plaintiff is predicated on figures and hypothetical, rather than actual factual circumstances made by it because of the policies "LIMITED LIABILITY". It is contended by the Wisconsin Law firm acquiring by a-lightness any legal right by reason of the payment of compensation on account of the injury or death of an employee. In no one claim such employee at the beneficiaries can have acquired a third party viewpoint because of the most rule of insurance.

In our opinion the beneficial interest in the employee-policyholder or other entitle interest the liability on the indemnity policy, which defendant moves to quash, is not contemplated by the Workmen's Compensation act of the Code of Illinois. We are clearly of the opinion that under the provisions of the act defendant is not justified in claiming discharge of its liability under the $20,000 indemnity policy issued to plaintiff, except to the $6,000.00 actually paid to the respective claimants on behalf of plaintiff and the uniform company. The balance of its claim of diminished liability of the $20,000 indemnity policy is merely artificial. There remains a balance of indemnity liability on this policy more than sufficient to satisfy the judgment in this cause.

For the reasons herein the judgment of the Superior Court is affirmed.

AFFIRMED.

Gulick and Dentist, JJ., concur.

114

36675

JOHN B. MALLERS, Jr., et al.,
Appellees,

v.

WEST SIDE BRAIDING & EMBROIDERY
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

272 I.A. 620

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, West Side Braiding & Embroidery Company, a corporation, seeks to reverse a judgment rendered against it for $470 in a trial by the court without a jury in the Municipal court of Chicago, in favor of John B. Mallers, Jr., et al., plaintiffs.

Plaintiffs, April 14, 1932, originally secured a judgment by confession for the above amount on a lease, which amount represented $200 claimed to be due as the balance of rent for the month of November, 1931, $250 rent for the month of December, 1931, and $20 attorneys' fees. Upon defendant's petition and motion to vacate the judgment by confession it was granted leave to defend, and after a full hearing the court confirmed the judgment theretofore entered by confession.

Defendant was occupying space in premises belonging to plaintiffs under a written lease which provided for payment of $250 rent monthly in advance for the year ending December 31, 1931.

Defendant alleged in its petition to vacate the judgment that on or about March 25, 1931, plaintiffs, through their agent, granted it a reduction of rent to $200 a month for the unexpired term of the lease; that thereafter, commencing with the month of April, 1931, defendant paid $200 rent for each month, up to and

including December, 1931; and that the rental payments for these nine months were made by checks for $200 each, which were accepted and cashed by plaintiffs as payment in full of the rent for those months. Defendant denied that it owed plaintiffs $470 or any other sum for rent.

Defendant contends that the rent stipulated in the written lease was reduced from $250 to $200 a month by an oral agreement between plaintiffs and defendant for the unexpired term of the lease; that the payment of the reduced rent by the tenant, and its receipt by the landlord, was in execution of the oral agreement and precluded the landlord from recovering the difference between the rent stipulated in the lease and the reduced amount paid as and for rent by defendant; that the oral agreement for the reduction of rent constituted a gift to the tenant of $50 a month, and that upon the payment of the reduced rental each month and its acceptance by the landlord, the gift of the amount of the agreed reduction for each month was executed and irrevocable and barred recovery as to such reduction.

Plaintiffs' theory is that they never agreed or consented to a reduction of defendant's rent, and that the payments of $200 made each month for rent were accepted on account only and credit allowed defendant on the total indebtedness due plaintiffs from defendant under the terms of and for the period covered by the written lease.

It is urged that the trial court erroneously determined the issue in this cause on the theory that a parol agreement to reduce the amount of rent specified in a written lease was invalid and void because no consideration was shown therefor. We find no reasonable basis for this contention in the record.

We are satisfied from a complete examination of the record

Assuming December, 1919 as the period payments for these nine months were made by checks for $500 each, which were accepted and cashed by plaintiff as payment in full of the rent for these months. Defendant stated that at most plaintiff's $478 or any other sum for rent.

Defendant contends that the rent originated in the written lease was reduced from $500 to $500 a month by an oral agreement between plaintiff and defendant for the unexpired term of the lease; that the payment of the reduced rent by the tenant, and its receipt by the landlord, was in accordance of the oral agreement and prevented the landlord from recovering the difference between the rent originated in the lease and the reduced amount paid in and for rent by defendant that the oral agreement for the reduction of rent constituted a gift to the tenant of $22 a month, and that upon the payment of the reduced rent each month and its acceptance by the landlord, the gift of the amount of the agreed reduction for each month was executed and irrevocable and barred recovery as in each transaction.

Plaintiffs' theory in this case never appear or contended to a reduction of defendant's rent, and that the payments of $500 made each month for rent were accepted as income only and credit against defendant on the total indebtedness for plaintiff from defendant under the terms of and for the period covered by the written lease.

It is urged that the trial court erroneously determined the issue in this case on the theory that a parol agreement to reduce the amount of rent specified in a written lease was invalid and with however no consideration was shown therefor. We find no reasonable basis for this conclusion in the record.

We are satisfied from a complete examination of the record

and a careful analysis of the evidence presented that the issue presented to the court was purely and squarely one of fact. It is apparent that the decision of the trial court was based upon the failure of defendant to establish by competent evidence the oral agreement for the reduction of rent, rather than upon the invalidity of such a parol agreement. It is conceded that such an agreement, when executed, is recognized under the law as binding upon parties to it.

The record discloses a sharp conflict between the evidence introduced by plaintiffs and defendant as to whether there was an oral agreement for the reduction of rent. Plaintiff Mallers, and other witnesses testifying in plaintiffs' behalf, stated positively that, although the secretary of defendant repeatedly requested a reduction in the rent provided under the lease because of the depressed condition of its business, no agreement was made in March, 1931, nor at any other time for a reduction from the amount of rent specified in the lease; that commencing in April, 1931, and for nine months, including December, 1931, defendant, contrary to the terms of the lease, mailed its check for $200 each month rather than for the $250 monthly rental provided in the lease, and that they accepted it; that inasmuch as no instructions accompanied the payments as to their application they credited them on defendant's monthly rent account commencing with the month of April, 1931; that repeated requests were made of defendant for the balance of rent due and statements left with it showing such balance from time to time; that representatives of defendant continuously pleaded for additional time, urging unfavorable business conditions; that a new lease was executed between the parties for the same premises for the year 1932 at a reduced rental after defendant had again promised to pay the balance due

and a careful analysis of the evidence presented that the issue presented to the court was purely and exactly one of fact. It appears that the decision of the trial court was based upon the failure of defendant to establish by competent evidence the oral agreement for the reduction of rent, rather than upon the invalidity of such a parol agreement. It is asserted that such an agreement, when established, is recognized under the law as binding upon parties to it.

The record disclosed a sharp conflict between the evidence introduced by plaintiffs and defendant as to whether there was an oral agreement for the reduction of rent. Plaintiff Hylland, and other witnesses testifying in plaintiffs' behalf, stated positively that, although the monthly of defendant repeatedly requested a reduction in the rent payable under the lease because of the depressed condition of its business, no agreement was made in March, 1931, nor at any other time for a reduction from the amount of rent specified in the lease; that commencing in April, 1931, and for nine months, including November, 1931, defendant, contrary to the terms of the lease, mailed its check for $100 each month rather than for the $150 monthly rental provided in the lease, and that they accepted it; that inasmuch as no instructions accompanied the payments as to their application they credited them on defendant's monthly rent account commencing with the month of April, 1931; that repeated requests were made of defendant for the balance of rent due and unpaid but it failed to remit such balance from time to time; that representatives of defendant continuously pleaded for additional time, making unfavorable business conditions and a new lease was executed between the parties for the same premises for the year 1932 at a reduced rental after defendant had again promised to pay the balance due

on the 1931 rent; and that defendant's arbitrary deduction for nine months of $50 a month from the rent specified in the lease left it indebted to plaintiffs $200 for rent for November and $250 for December, 1931.

Witnesses testifying in defendant's behalf declared that upon being advised of the precarious condition of defendant's business, plaintiffs through their authorized agent on or about March 25, 1931, at defendant's request, entered into an oral agreement to reduce the rent from $250 to $200 a month, and that in accordance with the terms of that agreement defendant forwarded through the United States mail to plaintiffs its check for $200 for each of the nine months from April, to and including December, 1931; that its check each month was accompanied by a letter advising that the check was payment in full of the rent for the particular month; that no statements were ever delivered or sent to it claiming any balance due for rent; that no requests were made for payment of any balance of rent claimed to be due and that the first notice defendant had that plaintiffs claimed any balance due for rent was the service of an execution on it following the judgment by confession; that leases were executed between the parties for the same premises for the year 1932 and again for the year 1933, and that neither at the time of their execution nor prior thereto was any demand made for any balance of rent claimed to be due under the 1931 lease, or any mention made of any such balance.

Plaintiffs insisted on the trial that no letters accompanied the checks in question, advising that the checks for $200 mailed by defendant and received by plaintiffs for the months from April to December, 1931, were payments in full of the rent for the respective months. Defendant offered in evidence copies of

on the 1921 Act; and that internally arbitrary distortion for nine months of 100 weeks from the even quantified in the Issue Date is included in plaintiff's for year the November and $250 for December, 1921.

[illegible] Plaintiff in defendant's behalf contend that upon being advised of the prevailing conditions of defendant's business, plaintiff through their authorized agent on or about March 30, 1921, at defendant's request, entered into an oral agreement to receive the work from [illegible] to [illegible] weeks, the last 18 months with the terms of that agreement determined through the United States Mail to plaintiff's office for $300 for work of the nine months from April, to and including December, 1921 that the work was actually performed by a Doctor stating that the work was performed in full of the term for the particular month for statements were rendered by them to it claiming any balance due thereunto; that no vouchers were made for payment of any balance of that claimed to be due and that the first notice received had that plaintiff claimed any balance due for work was the receipt of an account on it initiated by the defendant by interpleading that issue was accurate between the parties for the same purchase for the year 1921 and again for the year 1922, and that notice as the time of their execution nor prior thereto was any demand made for any balance of work claimed to be due after the first trial, or any written demand of any such balance.

Plaintiff's limited on the total that he believes corresponded the terms to vouchers, stating that the charges for $300 paid by defendant and received by plaintiff for the months from April to December, 1921, were payments in full of the work for the respective months. Defendant offered in evidence copies of

nine letters, the originals of which it claimed accompanied the nine checks for the months involved in this proceeding. Plaintiffs in effect charged that the copies of these nine letters were manufactured for the purpose of the trial. Defendant countered to the same effect that letters or copies of letters offered in evidence by plaintiffs were spurious and manufactured, never having been either sent or received by defendant.

Where practically every salient fact was controverted as it was here, the law is clear and well recognized that a court of review will not disturb the finding and judgment of the trial court on issues of fact, unless such finding and judgment are manifestly against the weight of the evidence.

This cause was peculiarly one where the judgment of the trial court must necessarily prevail. The contentions of the parties on the facts were diametrically opposed to each other. The material and decisive factors requiring the determination of the court were the credibility of the witnesses and the authenticity of the various disputed letters received in evidence. The trial court had an opportunity of seeing and hearing the witnesses and its judgment should not be set aside unless we are satisfied that it is contrary to the law and the evidence. Lynch v. Mattinger, 163 Ill. App. 359; Cole & Company v. Bradley & Vrooman Company, 163 Ill. App. 366; Meath v. Moll, 163 Ill. App. 425; Johnson v. McWillis, 228 Ill. 351.

The trial judge indicated by his finding that the parol agreement for the reduction of the rent stipulated in the written lease was not sufficiently established by the evidence and that it was not proven that plaintiffs accepted the $200 monthly rental remittances as full payment of the rent for the respective months. We know of no method by which we could make ourselves any more

certain of the exact truth than he was. (Lynch v. Hettinger, supra.)

For the reasons indicated herein, the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley and Meanlan, JJ., concur.

extract of its every trade that he was. [Letter to Dictionary Johnson.]

For the present Intendant Bonvin, the judgment of the Shoulders every is activeness.

ATTACHED.

Holding and invisible 10.; summer.

36727

MINNIE LUSSEM, Executrix, and
EDWARD H. MOHRDIECK, Executor of the
Estate of John Lussem, Deceased, and
MINNIE LUSSEM,
Appellants,

vs.

GUILIO PETITO et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

272 I.A. 620

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

By this appeal complainants seek to reverse a decree of the Circuit court dismissing their bill for want of equity. The decree was based on the report of the Master in Chancery. No point is raised on the pleadings.

The bill of complaint alleges that John Lussem, one of complainants, since deceased, was the owner of lots 3 and 4 in question, situated at 1004-1006 So. Western avenue, and that Minnie Lussem was his wife; that on October 30, 1922, he entered into a written contract which provided for the sale of the lots to Guilio Petito and Vincenza Petito for the consideration of $8,000, $2,000 to be paid upon the signing of the contract and $500 or more semi-annually thereafter, and that when $4,000 had been paid complainant was to convey the property by warranty deed to the purchasers, taking back notes secured by a trust deed on the premises for the balance of the purchase price; that the contract provided that as an additional consideration complainants were to retain any award ordered by the court as a result of contemplated condemnation proceedings by the City of Chicago against the east 17 feet of the lots for the widening of Western avenue; that the purchasers were to pay any assessments levied because of such improvement, and that in the event the improvement was not made the purchasers were to pay as additional consideration a sum equal to the contemplated award; that the covenants and agreements of the contract

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

By this appeal complainants seek to reverse a decree of the Cook County court dismissing their bill for want of equity. The decree was based on the report of the master in chancery. We point it quoted on the pleadings.

The bill of complaint alleges that John Lucas, one of complainants, since deceased, was the owner of lots 3 and 4 in Greenline, situated at 3800-1000 Ss. Trenton avenue, and that Gladys Lucas was his wife; that on October 31, 1921, by mutual duly written contracts which provided for the sale of the lots to Dalik and Vincenus Petis for the consideration of $3,000, $1,000 to be paid upon the signing of the contract and $500 or more monthly thereafter, and that $3,100 had been paid complainants were to convey the property by warranty deed to the purchasers, taking back notes secured by a trust deed on the premises for the balance of the purchase price; that the contract provided that no additional consideration complainants were to receive any waiver by the court as a result of contemplated condemnation proceedings by the city of Chicago against the east 17 feet of the lots for the widening of Kenton avenue; that the purchasers were to pay any assessments levied because of such improvement, and that in the event the government was not made the purchasers were to pay no additional consideration; a copy of the contract is attached hereto; that the attorneys and representatives of the contract

were by its terms binding on the heirs, executors, administrators and assignees of the parties; that the contract was recorded against the title to the lots October 30, 1922; that on May 1, 1925, the purchasers had paid $4,000 on the purchase price of the lots and Lussem and his wife by warranty deed conveyed the lots to them, taking back their trust deed securing note No. 1 for $4,000, representing the remaining half of the $8,000, and note No. 2 for $3,000, the approximate amount of the contemplated award, which was conditional and to be void upon receipt of the award by Lussem; that note No. 2 was placed in escrow with the Chicago Title & Trust Company; that the City of Chicago through condemnation proceedings, took the east 17 feet of lots 3 and 4 and was ordered by the Superior court to pay therefor $4,000 to the owner or person entitled thereto; that thereafter on July 16, 1928, the Petitos executed a trust deed to secure a loan of $25,000, and on August 30, 1928, executed another trust deed to secure an additional loan of $5,000 on the premises; that on April 1, 1929, the Petitos by warranty deed conveyed the property, except the east 17 feet, to one Schwartz and on October 8, 1928, conveyed the east 17 feet of lots 3 and 4 to Tony and Anna Angileri; that an assessment of $2,280 against the property for the widening of Western avenue has not been paid by any of the defendants and that unless it is paid the City of Chicago will deduct it in pursuance of the statute from the amount of the award; and the bill prayed that defendants or some or either of them be required to pay the assessment of $2,280 standing against the property because of the improvement, xxx that defendants be restrained from attempting to collect any part of the $4,000 award finally made, and that the City of Chicago be required to pay to complainants $4,000, the amount of the award.

The various defendants filed answers denying that complainants were entitled to the relief prayed. The answer of xxxxxxxxxx

been by its terms binding on the mayor, treasurer, administrators and beneficiaries of the parties, that the contract was terminated against the city prior to the late October 6, 1926; that on July 1, 1928, the purchasers had paid $4,000 on the purchase price of the lots and leases and his city treasurer had converted the lots to them, taking back their first mortgage notes, i.e. for $1,000, representing the remaining half of the $4,000, and note No. 2 for $3,000, the approximate amount of the contemplated award, which was conditional and to be held upon receipt of the award by trustee; that July 1, 2 was filed in escrow with the Chicago Title & Trust Company; that the City of Chicago through condemnation proceedings, taking was if that of lots 2 and 4 was entered by the Superior Court on July 14, 1928, the petition requested a final decree to secure a loan of $23,000, and on August 4, 1928, executed another first lien to secure an additional loan of $3,000 on the premises; that on April 1, 1928, the trustee by warranty deed conveyed the property, except the east 17 feet, to one Schwartz and on October 4, 1928, conveyed the east 17 feet of lots 3 and 4 to Joy and Anderson; that an assessment of $3,000 against the property for the widening of Western avenue has not been paid by any of the defendants and that unless it is paid the City of Chicago will demand it in proceeds of the sights from the amount of the award; and the bill states that defendants or some or either of them be required to pay the assessment of $3,000 standing against the property because of the improvement, xxx that defendants be restrained from retaining in addition any part of the $4,000 award finally made, and that the City of Chicago be required to pay to complainants $4,000, the amount of the award.

The various defendants filed answers denying that complainants were entitled to the relief prayed. The answer of xxxxxxxxxxxx

Schwartz denied that $4,000 was awarded to complainants in the condemnation proceeding, but asserts that on April 19, 1928, that amount was awarded to the owners or parties interested in the lots in question.

The answer of the Petitos admits the contract for the sale of the lots but asserts that complainants' warranty deed to them contained no condition, limitation or restriction, and denied that complainants never received any part of the consideration for their note No. 2. It alleges that on May 15, 1928, they gave complainants their note for $4,000 secured by trust deed on other real estate which discharged their note No. 2 of May 1, 1925, for $3,000; that on April 12, 1929, they gave complainants their note for $4,000 secured by trust deed on still other real estate, conditioned that the payment to complainants of the award for the condemnation of the east 17 feet of lots 3 and 4 for the widening of Western avenue shall constitute a credit on the note and that this note was given in discharge of the note and trust deed of May 15, 1928; that the rights of the holders of the $28,000 bonds secured by the trust deed of July 16, 1928, are paramount and superior to the claims of all other parties to this proceeding.

The appellees, Mid-City Trust and Savings Bank, Joseph Levinson and H. R. Otto, were named as co-defendants, together with certain other parties, in the cross bill filed by Tony Angileri and Anna Angileri, two of the defendants to the original bill, which cross bill was dismissed for want of prosecution by the decree dismissing the original bill for want of equity. The cross bill and the several answers thereto disclose that the Mid-City Trust and Savings Bank has no interest in the record title to lots 3 and 4 in question, except the east 17 feet thereof; that Levinson is the legal owner and holder of $7,000 of the bonds of the $28,000 loan secured by the trust deed of July 16, 1928, covering the premises in question; and that H. R. Otto is the legal owner of record of

Counsel; Denied that $4,000 was secured to complainants in the condemnation proceeding, but asserts that on April 22, 1926, that amount was credited to the owners of parties interested in the land in question.

The answer of the Public admits the contract for the sale of the land but asserts that complainants' alleged loss is upon explained no condition, limitation or restriction, and denied that complainants never received any part of the consideration for their note No. 5. It alleges that on May 22, 1921, they gave complainants their note for $4,000 secured by trust deed on other real estate which discharged their note No. 2 or May 1, 1926, for $3,000; that on April 22, 1920, they gave complainants their note for $4,000 secured by trust deed on still other real estate, conditioned that the payment to complainants of the award for the condemnation of the east 17 feet of Lots 3 and 4 for the widening of Western avenue shall constitute a credit on the note and that this note was given in discharge of the note and trust deed of May 18, 1926; that the rights of the holders of the $25,000 bonds secured by the trust deed of July 18, 1922, are paramount and superior to the claim of all other parties to this proceeding.

The appellees, Ida-City Trust and Savings Bank, Joseph Lawlessen and H. H. Otto, were named as co-defendants, together with certain other parties, in the cross Bill filed by Tony Angiuli and Anna Angiuli, two of the defendants in the original bill, which cross bill was dismissed for want of prosecution by the decree dismissing the original bill for want of equity. The cross bill and the answers thereto disclose that the Ida-City Trust and Savings Bank has no interest in the record title to Lots 3 and 4 in question, except the east 17 feet thereof; that Lawlessen is the legal owner and holder of $7,000 of the bonds of the $25,000 issue secured by the trust deed of July 18, 1922, covering the premises in question; and that H. H. Otto is the legal owner of record of

lots 3 and 4 except the east 17 feet thereof.

The evidence on the material issues, which is largely documentary, is undisputed and discloses that on and prior to October 30, 1922, John Lussem was the owner of lots 3 and 4, described in the bill of complaint; that October 30, 1922, John Lussem entered into an agreement in writing with the defendants, Guilio Petito and Vincenza Petito, to convey to them lots 3 and 4 for the sum of $8,000, payable $2,000 cash and the balance in semi-annual installments of $500 each, the purchasers to pay all taxes, assessments, etc., levied subsequent to 1921, and to keep the premises insured against loss by fire, the grantors to retain the amount of a contemplated award in a condemnation proceeding involving the taking of the east 17 feet of the lots for street purposes in the widening of Western avenue; that thereafter on May 1, 1925, the Petitos having paid to Lussem the sum of $4,000, received a warranty deed to lots 3 and 4, and executed two notes and a trust deed to the Chicago Title & Trust Company, trustee, to secure the payment of the notes, note No. 1 for $4,000 being for the balance of the purchase price of said lots (except the east 17 feet thereof), and note No. 2 for $3,000, balance due on the purchase price of the east 17 feet of the lots in case the city did not take same or Lussem did not receive the condemnation award for same from the city; that note No. 2 was placed in escrow with the Chicago Title & Trust Company to be cancelled and delivered to its makers, or their assigns, in case said widening is consummated and the award paid to Lussem; and that the warranty deed from complainants to the Petitos and the trust deed from the Petitos to Chicago Title & Trust Company, trustee, were recorded May 12, 1925; that May 22, 1928, the Chicago Title & Trust Company, trustee, executed a release of the trust deed, pursuant to the written authori-

lots, and accept the usual 5% trust interest.

The evidence on the material issues, which is largely documentary, is undisputed and discloses that on and prior to October 30, 1920, Otto Jacobs was the owner of Lots 2 and 4, described in the bill of complaint; that October 30, 1920, Otto Jacobs executed and delivered to William Jacobs his warranty deed, which was duly recorded in Cook County, Illinois, on the 1st day of November, 1920, and Jacobs and Tiscornia Portes, to convey to them Lots 2 and 4 for the sum of $2,000, payable $2,000 down and the balance in quarterly installments of $200 each, the purchasers to pay all taxes, assessments, etc., levied subsequent to 1921, and to keep the premises insured against loss by fire, the grantors to retain the deed as a security and in a contemporaneous proceeding involving the taking of the same 5% trust of the lots for interest purposes in the wherewithal of Western Accident that contractor on May 2, 1923, the Trustee having paid in full the sum of $4,000, receipted a warranty deed in lots 2 and 4, and returned the notes and 5 trust trust to the Chicago Title & Trust Company, trustee, in order the payment of the notes, note No. 2 for $4,000 being for the balance of the purchase price of said lots (except the usual 5% trust interest), and note No. 3 for $2,000, balance due on the purchase price of the usual 5% trust of the lots in case the city did not take same or Jacobs did not receive the condemnation award for same from the city that note No. 3 was placed in escrow with the Chicago Title & Trust Company to be cancelled and delivered to the makers, on their failure, in case said mistake to commencement due the award paid to Jacobs; and that the warranty deed from Jacobs, negotiable to the lots the trust deed from the Trustee to Chicago Title & Trust Company, trustee, were recorded May 24, 1921, that May 24, 1923, the Chicago Title & Trust Company, trustee, executed a release of the trust deed, pursuant to the written mandate.

zation of John Lussem and Guilio Petito, dated May 18, 1928, which release was recorded May 22, 1928; that July 16, 1928, the Petitos gave a trust deed on lots 3 and 4 to the Chicago Title & Trust Company, trustee, to secure a loan of $25,000 made by them on that date, and August 30, 1928, the Petitos gave a trust deed on the same property to Vincent Chiesi, to secure an additional loan of $5,000, and that these trust deeds are unreleased and unsatisfied of record; that April 11, 1929, the Petitos gave their warranty deed to Ben N. Goodman, conveying lots 3 and 4 (except the east 17 feet thereof) and also gave a warranty deed dated October 8, 1929, to Tony and Anna Angileri, conveying to them the east 17 feet of lots 3 and 4, both of which documents were recorded; that April 12, 1929, the Petitos gave to Lussem their trust deed on certain lots 26 and 27 to secure their $4,000 note, which trust deed provides that if the City of Chicago shall pay to Lussem the award of $4,000, or any part thereof, as compensation for the east 17 feet of lots 3 and 4 for the widening of Western avenue, such sum so paid shall be a credit on the note.

Complainants contend that the interest of defendants Guilio Petito and Vincenza Petito, and all parties holding or claiming any interest in or to the east 17 feet of lots 3 and 4, through or under them, is subordinate and subject to and bound by the terms an conditions of the written agreement for a warranty deed of October 30, 1922, between Lussem and the Petitos, notwithstanding the release of the trust deed of May 1, 1925, on May 22, 1928, by the Chicago Title & Trust Company, trustee, pursuant to the written authorization of John Lussem and Guilio Petito of May 18, 1928; and that complainants alone are entitled to receive the $4,000 award from the City of Chicago for the condemnation of the east 17 feet of lots 3 and 4, free and clear of any charge or assessment made against the property by reason of the improvement.

Cross defendants' (appellees') theory is that, having made no reservation of the award in and by their warranty deed to the

ration of John Lawson and Guilds Building, dated May 14, 1928, which
release was executed May 30, 1929; that July 24, 1928, the Petitioner
gave a trust deed on Lots 3 and 4 in the Coleman Title & Trust
Company, trustee, to secure a loan of $18,000 made by them on that
date; and August 10, 1928, the Petitioner gave a trust deed on the
same property to Edward Ehrenfeld, to secure an additional loan of
$4,000, and that these trust deeds are satisfied and reconveyed
of record; that April 11, 1929, the Petitioner gave their promissory
note to Sou Ki Chinlund, amounting into a lien (except the sum of
$3,000 thereof) was also gave a mortgage deed dated October 8, 1929,
to Tony Sue Jones Angliard, amounting to them the sum of $7 feet of
Lots 3 and 4, with at which commitment was executed that April 14,
1929, the Petitioner gave to Lawson Guilds trust deed on certain lots
to secure to be owner their $4,000 note, which trust deed provides
that if the City of Chicago shall pay to Lawson the amount of $4,000,
or any part thereof, as compensation for the west 17 feet of Lots 3
and 4 for the widening of Tulsa street, then the paid shall be
a credit on the note.

Complainants contend that the Commissioner of Streets,
Guilds Trust and Thomson Trust, and all public bodies or claiming
any interest in or to the west 17 feet of Lot 3 and 4, through
or under them, is subordinate and subject to and bound by the terms and
conditions of the written agreement for a certain deed of October 30,
1922, between Lawson and the trustees, specifically the release of
the trust deed of May 14, 1928, on July 24, 1928, by the Guilds Title
& Trust Company, trustee, pursuant to the written authorization of
John Lawson and Guilds Building of May 14, 1928; and that complainants
claim are entitled to receive the $4,000 owed from the City of
Chicago for the condemnation of the west 17 feet of Lots 3 and 4, free
and clear of any charge or encumbrance held against the property
by reason of the improvements.

Lawson defendants' (appellees') theory is that, having made
no reservation of the award in and by their warranty deed to the

Petitos and Lussem having authorized the cancellation of the $3,000 note held in escrow by the Chicago Title and Trust Company, and the release of the trust deed covering lots 3 and 4 given as security for this note, the Lussems waived and released their right to a lien on the award; that upon the cancellation of the $3,000 note and the release of the trust deed all parties becoming interested in lots 3 and 4 subsequent to the release had the right to assume that Lussem waived his right and claim to the award and were not bound to examine the title to other real estate to discover possible reservations of Lussem's claim to the award in notes and trust deeds against other property substituted for the $3,000 note and trust deed against lots 3 and 4 released May 22, 1928; and that by reason of the delivery of the warranty deed to the Petitos without any reservation of the award and the authorization to the Chicago Title and Trust Company, Trustee, to release the trust deed of record against this property, complainants are estopped from claiming the award; that the award is not impressed with an equitable lien in favor of complainants; and that the right, title and interest of all parties to this proceeding are subordinate and subject to the rights of the holders of the $25,000 bonds secured by the trust deed of July 16, 1928.

Upon reference the Master found that the Lussems by their warranty deed to the Petitos did not reserve any right in and to the award, and that without any such restriction or reservation subsequent purchasers or incumbrancers did not have any means of knowing that they reserved any right to the award; that the only notice of record to subsequent purchasers or incumbrancers of the Lussems' claim to the award that could be binding on them was contained in note No. 2 and the trust deed of May 1, 1925, recorded May 12, 1925, from the Petitos to the Chicago Title and Trust Company securing same; that this trust deed remained a lien of record until May 27,

Petition and Lunsen having authorized the cancellation of the $2,000 note held in escrow by the Chicago Title and Trust Company, and the release of the trust deed covering Lots 3 and 4 given as security for this note, the Lunsens waived and released their right to a lien on the award; that upon the cancellation of the $2,000 note and the release of the trust deed all parties beneficially interested in Lots 3 and 4 subsequent to the release had the right to assume that Lunsens waived his right and claim to the award and were not bound to examine the title to either real estate to discover possible reservations of Lunsen's claim to the award in notes and trust deeds against other property substituted for the $2,000 note and trust deed against Lots 3 and 4 released May 22, 1928; and that by reason of the delivery of the warranty deed to the Petition without any reservations of the award and the satisfaction in the Chicago Title and Trust Company, Trustee, to release the trust deed of record against this property, complainants are estopped from claiming the award; that the award is not incumbered with an equitable lien in favor of complainants; and that the right, title and interest of all parties to this proceeding are subordinate and subject to the rights of the holders of the $25,000 bonds secured by the trust deed of July 14, 1922.

The referee the further found that the Lunsens by their warranty deed to the Petition did not reserve any right in and to the award, and that without any such reservation or restriction such purchasers in incumbrances did not have any cause of knowing that they reserved any right to the award; that the only notice of record to subsequent purchasers or incumbrancers of the Lunsens' claim to the award that could be binding on them was contained in note No. 2 and the trust deed of May 1, 1922, recorded May 12, 1922, from the Petition to the Chicago Title and Trust Company covering [illegible] that that trust deed contained a lien of record until May 27,

1928, when it was released pursuant to the written authorization of Lussem and ~~xxx~~ Petito; that at the time of the release of this trust deed John Lussem accepted another note and trust deed against other real estate as a substitute for and in satisfaction of the Petitos' $3,000 note of May 1, 1925, thepayment of which was conditioned on the abandonment by the City of Chicago of the project of widening Western avenue and the condemnation of the east 17 feet of lots 3 and 4, and reported as his conclusions that upon the cancellation of the original note and the release of the trust deed securing it, any subsequent bona fide purchaser or incumbrancer had the right to assume that complainants had cancelled, waived and released any claim they had to the award, since the last notice of record to the public of claimants' claim or right to the award was contained in the released trust deed; that the release of the trust deed of May 1, 1925, cancelled complainants' right to the award as against subsequent innocent purchasers or incumbrancers; that, notwithstanding the manifest intention of complainants and the Petitos in their various transactions to secure the interest of complainants in the award, subsequent purchasers or incumbrancers were only bound to examine the title record of the lots in question and not the record of any other real estate; and that by reason of the acceptance of substituted notes and trust deeds against other property, and the release of the original trust deed, complainants are estopped from claiming the award or successfully asserting that the award was impressed with an equitable lien in their favor.

Upon approval of the master's report by the court, a decree was entered dismissing the bill for want of equity.

The courts have uniformly held that, if the owner of a mortgage through his own neglect or misplaced confidence is responsible for its being released of record, he will not be permitted to establish his lien to the detriment of one who has innocently dealt

1919, when it was related particularly in the written negotiations of Lassen and Petito, that at the time of the release of this [illegible] John Lassen accepted another note and trust deed against other real estate as a substitute [illegible] and be satisfactory to the Petitos." It was at July 3, 1919, thereupon of which was attached on the abandonment by the City of Chicago of the project of widening Western avenue and the condemnation of the east 17 feet of lots 3 and 4, and reported on his conclusions that upon the modification of the original note and the release of the trust deed securing it, any subsequent liens rights purchasers or incumbrancers had the right to assume that completely had cancelled, waived and released any claim they had to the award, since the last notice of right to the public of abandonment' claim or right to the award was contained in the released trust deed; that the release of the trust deed of July 3, 1920, cancelled complainants' right to the award as against subsequent lienors purchasers or incumbrancers; that, notwithstanding the manifest intention of complainants and the Petitos in their various transactions to secure the interest of complainants in the award, subsequent purchasers or incumbrancers were only bound to examine the title record of the lots in question and not the records of any other real estate; and that by reason of the acceptance of substituted notes and trust deeds against other property, and the release of the original trust deed, complainants are estopped from claiming the award or successfully asserting that the award was impressed with an equitable lien in their favor.

Upon approval of the master's report by the court, a decree was entered dismissing the bill for want of equity.

The charge here materially was lost, if the award of a substitute trust deed was subject or substituted equitable lien in favor of the bona fide holders of prior, he will not be permitted to attribute his loss to the injustice of one who has innocently lived

with the property in the belief that the mortgage was satisfied.

In the absence of any notice or ground of suspicion it is not the duty of a subsequent purchaser or incumbrancer to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record.

In support of this doctrine in Lennartz v. Quilty, 191 Ill. 174, the court said at pages 178, 179-180:

"The release of the trust deed securing the note of appellant, by Popp, the trustee, was unauthorized, for the reason that the note was not paid. The appellant and Johanna Quilty both acted in good faith and were equally innocent, and the question is, who must suffer for wrong of the trustee and Bernhard Behrend, who procured the release? The release of the premises without payment of the debt did not discharge the lien as between the original parties, and would not discharge it as to any subsequent purchaser or mortgagee with notice of the breach of trust. The rights of appellant would be superior to any person chargeable with notice that the trust deed was released in violation of its terms. The public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security unless he has notice or is chargeable in some way with notice of some title, conveyance or claim inconsistent therewith. In this case there was no actual notice or knowledge, but Johanna Quilty, the purchaser, acted in entire good faith, and paid her money relying upon the record of the release made on May 9, 1893, and recorded August 21, 1893, showing the payment and the discharge of the lien. Having no such knowledge, she had a right to rely upon the record unless there was something to put a reasonable person upon inquiry whether there was some infirmity in the release. * * * The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the absence of any notice or ground of suspicion it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record. There was nothing in this case to give notice to Johanna Quilty that appellant had any lien upon the property, and she was protected by the record."

In discussing the same principle in Vogel v. Troy, 232 Ill. 481, the court said at page 484:

"The law is well settled in this State that the trustee in a trust deed of the character of the one in question has the power, as to third parties, to release the lien created thereby so as to revest the title in the grantor, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure and in violation of the obligation of his trust; (Mann v. Jummel, 133 Ill. 523;) and such release may be made even though the indebtedness secured by the trust deed is not due at the time the release is executed. (Ogle v. Turpin, 102 Ill. 148.) In equity, however, a release unauthorized by the terms of the trust deed or by the consent of the cestui que trust will have no effect upon the trust deed as between the original parties or as to subsequent purchasers with notice: (Ogle v. Turpin, supra; Mann v. Jummel,

-ith the property in the belief that the mortgage was satisfied.

In the absence of any notice or proof of mistaken it is not the duty of a subsequent purchaser or incumbrancer to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record.

In support of this doctrine in Lamoreux v. Smith, 141 Ill. 176, the court said at pages 179-180:

"The release of the trust deed executed the same as an unclaim, by law, the trustee, was unauthorized. If the trustee that the note was not paid. The equitable and Chancery policy both acted in good faith and were equally innocent, and the question is, who must suffer for wrong of the trustee and improper recording, the prior owner the mortgagee? The rulings of the previous without payment of the debt did not discharge the lien as between the original mortgagee and would not discharge it as to any subsequent purchaser or mortgagee with notice of the breach of trust. The rights of equitable equity to superior in any person acquiring with notice that the trust deed was released in violation of its terms. The public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security unless he has notice or is chargeable in some way with notice of some claim, encumbrance or claim inconsistent therewith. In this case there was no actual notice or knowledge, but Johnson (Lily), the purchaser, acted in entire good faith, and paid his money relying upon the record of the release made on Sep 9, 1883, and recorded August 22, 1883, examining the payment and the discharge of the lien. Having no such knowledge, she had a right to rely upon the record unless there was fraud in put a reasonable person with slightly careful. Here was some information in the release. * * * The recording laws are designed to afford protection to purchasers acting in good faith and relying upon them, and to the absence of any notice or grounds of suspicion it is not the duty of a purchaser to search on obligation or publication the holder of a note secured by a trust deed regularly released of record. There was nothing in this case to give notice to Johnson (Lily) that appellant had any lien upon the property, and she was protected by the record."

In discussing the same principle in Jones v. Jones, 222 Ill. 481, the court said at page 484:

"The law is well settled in this State that the trustee in a trust deed of the character of the one in question has the power, as to third parties, to release the lien created thereby as to be revest the title in the grantor, even though in fact no release the satisfaction of the indebtedness which the trust deed was given to secure and in violation of the obligation of his trust; (Ryan v. Dunlap, 114 Ill. 62;) and such release may be made even though the indebtedness secured by the trust deed is not due at the time the release is made. (Cole v. Martin, 124 Ill. 143.) In equity, however, a release unauthorized by the terms of the trust deed or by the consent of the cestui que trust will have no effect upon the trust deed as between the original parties or as to those who have notice of the breach of trust. (Cole v. Martin, supra; Lamoreux v. Smith,

supra; Lennartz v. Quilty, 191 Ill. 174; Havighorst v. Bowen, 214 id. 90; Connecticut General Life Ins. Co. v. Eldredge, 102 U. S. 545.)"

In Vombrack v. Mayra, 331 Ill. 508, the following language was used by the court at page 512:

"The public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security unless he has notice, or is chargeable in some way with notice, of some title, conveyance or claim inconsistent therewith. (Lennartz v. Quilty, 191 Ill. 174; Holbrook v. Dickenson, 56 id. 497.) Likewise the Supreme Court of the United States in Patterson v. De La Monde, 8 Wall. 292, said: 'The object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of the property, must look, and if not otherwise informed they can rely upon the knowledge there obtained.'"

Complainants insist that the contract for the sale of lots 3 and 4 containing the reservation of the award to them, executed October 30, 1922, and recorded on the same day, remained uncancelled of record and was ample and sufficient notice to the world of complainants' interest in and claim to the award.

It is sufficient answer to this contention to state that the recording of the trust deed of May 1, 1925, also evidencing as it did complainants' claim to the award and the release of record of this trust deed, May 22, 1928, was notice to the public that complainants' claim to the award was extinguished by payment or otherwise. The release of record of the trust deed was more than two and one-half years subsequent to the date of the contract and its recordation, and, inasmuch as the trust deed also contained provision for the payment of the award to complainants, subsequent purchasers or incumbrancers were warranted in relying on the release of the trust deed as an extinguishment or cancellation of the claim to the award.

John Lussem authorized the trustee in writing to release the

cases: Lamontagne v. Quilter, 245 Ill. 496; Tankersley v. Graham, 234 Ill. 91; Commercial Mineral Ink Co. v. Ellerbe, 209 S.E. 3, 4, 5.)

In Tankersley v. Graham, 234 Ill. 91, the following language was used by the court at page 102:

"The public receipts of corporations and institutions affecting the title to real estate are established by statute in Illinois by evidence of such title, and a certificate may only come upon the security unless in the notice, or in a separate by such with notice, of some title, instrument or other instrument, therewith. (Lamontagne v. Quilter, 245 Ill. 496; Tankersley v. Graham, 234 Ill. 91.) Affected the income taxes of the United States in Patterson v. Ta'le Tenn, 1 Ill. 80, said: 'The object of all registry laws is to insure information to purchasers dealing with property concerning the title and encumbrances, but that is without that law other great instruments and liens. It is the duty, therefore, that particulars, or other particulars, or specializing the specialize of the property, must then, and if not otherwise indicated the duty upon the duty upon the instrument shall be obligated.'"

Complainants further that the conveyance for the sale of land E and a resulting the transfer of the state to them, executed October 20, 1933, and recorded on the same day, provided consideration of several and was ample and sufficient notice to the world of complainants' interest in and claim to the land.

It is sufficient answer to this contention to state that the transfer of the trust deed of July 1, 1932, also outstanding on it the complainants' claim to the property and the release of trust deed, Aug 22, 1933, was notice to the public that complainants' claim to the land was extinguished by payment or satisfaction. The release of record of the trust deed was more than two and one-half years subsequent to the date of the contract and its execution, and, inasmuch as the trust deed also contained provisions for the payment of the world in complainants, subsequent purchasers or lienholders were warranted in relying on the release of the trust deed as an extinguishment or cancellation of the claim to the land.

Some lawyers mistrusted the lawyer in writing to release the

trust deed of May 1, 1925, and the release was executed and recorded May 22, 1928. Thereafter on July 16, 1928, the Petitos obtained a loan of $25,000 on the premises and executed their trust deed to the Chicago Title and Trust Company to secure the indebtedness, and on August 30, 1928, obtained another loan of $5,000 giving as security therefor its trust deed covering the same premises. Both of these loans were made by innocent parties on the strength of the public record of title manifesting the release on May 22, 1928, of the trust deed of May 1, 1925, and without notice or suspicion of reservation of any kind by John and Minnie Lussem, the original grantors.

We are of the opinion that, under well established principles and the law as enunciated in the cases cited, the innocent subsequent incumbrancers are fully protected by the recordation of the release deed of May 22, 1928.

For the reasons indicated the decree of the Circuit court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

[illegible] date of May 1, 1929, and the actions now remaining are pending July 22, 1930. Subsequent to July 11, 1930, the trustee obtained a loan of $25,000 on the premises and executed their trust deed to the Chicago Title and Trust Company to secure the indebtedness, and on August 30, 1930, obtained another loan of $3,000 giving an mortgage thereafter the same deed securing the same premises. Both of these loans were made by investor relying on the example of the public record of title which could contain the release on May 1, 1930, of the trust deed of May 1, 1929, and without notice or knowledge of assertion of any claim by John [illegible], the original grantee.

In view of the opinion that, under well established principles and the law as announced in the cases cited, the Illinois mortgage or instrument was fully satisfied by the foreclosure of the release deed of May 11, 1930,

For the reasons indicated the decree of the circuit court is affirmed.

AFFIRMED.

Friday and Dowling, JJ., concur.

116 17

36538

LESLIE P. COLEMAN,
Appellee,

v.

HERMAN HEUSER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

272 I.A. 620[5]

MR. JUSTICE GRIFFEY DELIVERED THE OPINION OF THE COURT.

Upon a second jury trial of an action in assumpsit, commenced on May 3, 1929, to recover commissions as a real estate broker, plaintiff had a verdict for $13,000, and upon the hearing of defendant's motion for a new trial he remitted $4,250 and on October 20, 1932, judgment was entered against defendant for $8,750. The present appeal followed.

Upon the first trial in April, 1931, there was a verdict and judgment in plaintiff's favor for $8,750. Upon defendant's appeal from that judgment this court on February 23, 1932, reversed the judgment and remanded the cause. (Coleman v. Heuser, 265 Ill. App. 597.) The reasons stated in our opinion (unpublished) for the reversal were in substance (a) that the evidence did not sufficiently show that plaintiff was the procuring cause of the sale of the farm in question about July 3, 1925, to the "Brotherhood of American Yeomen," a corporation (hereinafter referred to as the Brotherhood); (b) that we failed to find in the record sufficient competent evidence tending to show fraudulent actions or attempts, either on defendant's part or that of representatives of the Brotherhood, to deprive plaintiff of his commissions; (c) that in our opinion the jury's verdict of $8,750 (which is 5 per cent of $175,000) - the price defendant

[illegible]

[illegible],

Appellee,

v.

[illegible],

Appellant.

[illegible] DISTRICT COURT OF THE [illegible] OF THE [illegible].

Upon a second jury trial on an action in [illegible] commenced on May 3, 1968, to recover compensation on a [illegible] policy, plaintiff had a verdict for $10,000, and upon the denying of defendant's motion for a new trial he entered $4,250 and on October 30, 1971, judgment was entered against defendant for $4,750. The present appeal follows.

Upon the first trial in April, 1970, there was a verdict and judgment in plaintiff's favor for $4,750. Upon defendant's appeal from that judgment this court on February 22, 1972, reversed the judgment and remanded the cause. (Johnson v. [illegible], 197 Ill. App. 897.) The reversal rested in our opinion (unpublished) for the reversal were in substance (a) that the evidence did not sufficiently show that plaintiff was the proximate cause of his wife's death in question about July 3, 1968, by the "instrumentality of Mexican Tourist," a compression (hereinafter referred to as the Brotherhood); (b) that we failed to find in the record sufficient independent evidence tending to show fraudulent intent or knowledge, either on defendant's part or that of representatives of the Brotherhood, to deprive plaintiff of his consideration; (c) that in our opinion the jury's verdict of $8,750 [which is a per cent of $10,000] - the policy [illegible]

received for the sale of the farm) was improperly influenced by plaintiff's letter to defendant of June 18, 1925 (a copy of which the court admitted in evidence over defendant's objection that it was a self serving instrument), and that the admission of the letter constituted prejudicial error. On the second trial this letter was not introduced in evidence.

Plaintiff's declaration consisted of a special count and the common counts. Defendant filed a plea of the general issue and two special pleas (1) failure of consideration, and (2) that "plaintiff never had exclusive authority to sell the property, and what authority he did have was revoked on to-wit: October 8, 1924." To these special pleas plaintiff filed replications. Subsequently, on November 18, 1950, defendant filed an affidavit of merits, hereinafter mentioned. In the special count plaintiff alleged in substance:

That on April 3, 1924, he was, and ever since has been, a licensed real estate broker in Chicago; that defendant was the owner of a large farm property (describing it) in the Township of Dundee, Kane County, Illinois; that on said day, at Chicago, defendant employed him to procure a purchaser for the property at the price of $200,000, and promised to pay to him the customary rate of commission for his services in procuring a purchaser; that the customary rate of commission, well known to defendant, was 5 per cent of the price at which the property was sold; that thereafter, and after accepting said employment, plaintiff used due diligence to find a purchaser, and to that end listed the property upon his books and spent much time, labor and money in efforts to find a purchaser; that "among his customers or correspondents" was the Brotherhood of American Yeomen, which was ready, able and willing to buy the property; that plaintiff took representatives of the Brotherhood to view the property; that defendant did not know them or the Brotherhood; that finally the Brotherhood purchased the property on July 3, 1925 for the sum of to-wit: $200,000; that such sale "was the result of plaintiff's efforts;" that defendant, "with the intent and purpose of avoiding payment of a commission" did not make the sale direct to the Brotherhood, but did on July 3, 1925 convey the property by warranty deed to one J. H. Bacon, who on the same day in turn conveyed it to the Brotherhood; and that because of the foregoing defendant is indebted to the plaintiff in the sum of to-wit: $10,000, etc.

In defendant's said affidavit of merits, in setting forth the nature of his defense, he alleged in substance:

That on October 8, 1924, defendant notified plaintiff that all authority theretofore given to him to sell the property was revoked; that the property was not sold until about 8 months after all agreements between plaintiff and defendant had been cancelled; that the purchaser of the property "was procured by defendant without aid or assistance of plaintiff, who rendered no services in connection with the sale;" that after October 8, 1924, "defendant did not deal with any customer of plaintiff in the sale of the property, but dealt with and sold the property to a purchaser procured by himself;" and that all negotiations resulting in said sale "were carried on by defendant without the aid and assistance of plaintiff."

On the second trial plaintiff was the principal witness in his behalf, and he called as witnesses his two brothers, Ray and Francis, also the defendant, and A. H. Hoffman, a director and vice-president of the Brotherhood during the years 1924 and 1925. Plaintiff also introduced in evidence numerous letters passing between him and certain officials of the Brotherhood, and a check of the Brotherhood for $20,000, dated June 13, 1925, payable to order of J. H. Bacon, and bearing on its face the statement: "In payment of Initial payment on Good Luck Farm, Sundee Township, Kane County, Illinois." On the back of the check are endorsed the signatures of Bacon and defendant and the fact that the check was paid on June 17, 1925. Bacon was an employee of the Brotherhood. During the introduction of plaintiff's evidence it was stipulated between the parties that under date of July 3, 1925, defendant and wife conveyed the farm by warranty deed to Bacon; that on the same day Bacon, a bachelor, conveyed the farm to the Brotherhood; and that both deeds were acknowledged on July 3, 1925, before a notary public, and recorded in the office of the recorder of deeds of Kane County, Illinois, on July 6, 1925. And defendant, as plaintiff's witness, testified that on July 3, 1925, he was, and had been, the owner of the farm in question and that he received for its sale the sum of $175,000.

Defendant was the principal witness in his behalf and two officials of the Brotherhood testified for him, viz., Mark

T. McKee (treasurer of the Brotherhood and Chairman of its Child's Home Committee) and Henry T. Meyers (State manager for Illinois of the Brotherhood.) Defendant testified in substance that he was aware that plaintiff during the summer and fall of 1924 had shown the farm to various officials of the Brotherhood and had made continued efforts to bring about a sale to it at defendant's price of $200,000, which he had told plaintiff was the lowest price for which he would sell; that on October 8, 1924, he (defendant) wrote a letter (introduced in evidence) to plaintiff saying in part: "Please be advised that I do not want you to sell my farm known as the Good Luck Farm;" that thereafter he (defendant) employed another Chicago real estate broker, named Brooman, to sell the farm; that Brooman introduced Bacon to him and he (defendant) had negotiations with Bacon; that he did not know that Bacon represented the Brotherhood; that it "did not strike him as peculiar that Bacon's first payment of $20,000 was made by a check issued by the Brotherhood;" that he endorsed the check and deposited it in his bank account; that both Bacon and Brooman are now dead; and that the day after he sold the farm plaintiff telephoned him and arranged for an interview a few days later.

Plaintiff's testimony as to this interview, which was had in defendant's Chicago office, is in substance that he said to defendant that he had just learned that defendant had sold the farm to the Brotherhood, that defendant knew that the Brotherhood "were my people," that he had interested its officials in the purchase of the farm and that he was entitled to his commissions; that defendant replied that he had not sold the farm to the Brotherhood but to "another man" who he had personally secured as a purchaser, and that plaintiff had not done anything to procure that purchaser and was not entitled to any commissions; and that

2. Hatch (President of the Development and Construction of the Child's Good Teacher) and Sherry J. Bergman (Senior Manager, Pro Children, of the Storefront). Interviews were initial in nature since he was aware that plaintiff during the summer and fall of 1992 had spoken to various officials of the Storefront and had made unsuccessful efforts to bring about a plan for the Storefront's purchase of $800,000, which he had told plaintiff was the lowest price for which he would sell; that on October 8, 1992, he (defendant) wrote a letter (introduced in evidence) to plaintiff saying in part: "Please be advised that I do not want you to sell my farm known as the Best Farm Dairy" that letter was (defendant) employed another Chicago real estate broker, Roger Brookman, to sell the farm; that Brookman informed Burton of this and he (defendant) had negotiations with Tandy and he did not have this Farm represented by Brookman; that he "did not advise him as particular what Burton's final payment of $800,000 was made by a check issued by the Storefront-Bank;" that he reviewed the check and explained it in his final accounting; that both Burton and Brookman are now dead and that the day after he left the Farm plaintiff informed him and arranged for an interview the same date.

Plaintiff's testimony in the trial differs, claiming that he had in defendant's Chicago office, by a mutual agreement that he would be entitled to the full income that derived from the farm to the Storefront, that defendant knew that the Storefront "were my people," that he had introduced the officials in the purchase of the farm and that he was obligated to his commitments that defendant explained that he had not sold the farm to the Storefront but to "another man" who he had personally accepted as a purchaser, and that plaintiff had not made negotiations in preference that defendant and was not entitled to any commissions and that

plaintiff rejoined that defendant "wouldn't be able to evade the payment of commissions in that way."

One of the contentions urged by defendant's counsel for a reversal of the present judgment is that the court erred in allowing plaintiff to state what was said by both parties at this conversation. It is argued that what plaintiff testified he said during the conversation was self serving and prejudicial. We find no substantial merit in the contention or argument.

Defendant's counsel's main contention is that the verdict and judgment are contrary to the evidence and the law on the questions whether plaintiff's efforts in his negotiations with the officials of the Brotherhood were the procuring cause of the sale of the farm, and whether defendant was guilty of fraudulent practices toward plaintiff. We cannot agree with the contention. In view of all the evidence contained in the present record we are of the opinion that these questions were peculiarly within the province of the jury to determine and we are not disposed to disturb the present judgment. (Rigdon v. Moro, 226 Ill. 382, 387; Hafner v. Herron, 165 Ill. 242, 246; Pate v. Marsh, 65 Ill. App. 482, 483-4; Kasar v. Johnson, 176 Ill. App. 349, 351; Reed v. Young, 146 Ill. App. 210, 213; Doggett v. Puppert, 178 Ill. App. 230, 231-2; Ogren v. Rundall, 220 Ill. App. 584, 587; Voellinger v. Kohl, 261 Ill. App. 271, 275.)

Defendant's counsel also contend that the verdict of $13,000, where the largest possible verdict would be $8,750 (or 5 per cent of the purchase price received by defendant), indicates such passion and prejudice on the part of the jury as requires a reversal of the judgment of $8,750. We find no substantial merit in the contention. The excessiveness of the verdict was cured by the remittitur of $4,250, and this court is not justified in

plaintiff argues that defendant "mailed" he did in truth the process of manufacture is that way."

The of-the assertions made by defendant's counsel for a reversal of the jurors judgment is that the court erred in allowing plaintiff to state what was said by both parties at this conversation. It is argued that such plaintiff testified he said during the conversation was self serving and prejudicial. To find no substantial merit in the contention at issue.

Defendant's counsel's main contention is that the evidence and judgment are contrary to the evidence and the law on the question whether plaintiff's attorney in his negotiations with the officials of the Bank knew the precarious nature of the title of the land, and whether defendant was guilty of fraudulent practices toward plaintiff. A review of the conclusions. In view of all the evidence contained in the present record we are of the opinion that these questions were peculiarly within the province of the jury to determine and we are not disposed to disturb the jurors judgment. Illinois v. Smith 3d 112, 4th 2d 1, Taylor v. Taylor, 3d 112, 340, 1961 Lady v. Lady, 3d 112, 4th 2d, 484-4; Ziman v. Johnson, 374 ill, 4th 2d, 1941 Bond v. Jones, 3d 112, 4th 2d, 1941, Jackson v. Jackson, 3d 112, 4th 2d, 1941 Wallinger v. Jones, 3d 112, 4th 2d, 1941.)

Defendant's counsel also contend that the writing of 19,000, upon the limited probate trust was in 19,000. In a for some of the jurors prior involved by defendant, indicate such payment and evidence on the part of no fact on behalf a reversal of the judgment of 19,000. In view no substantial merit in the contention. The circumstances of the verdict was notice by the modification of 19,000, and this court is not justified in

presuming that passion and prejudice influenced the verdict of the jury in plaintiff's favor. (Atchison, etc. Ry. Co. v. Berkovich, 263 Ill. App. 1, 14-15.)

Defendant's counsel also contend that the court committed error in admitting in evidence, over a general objection, four letters offered by plaintiff and written to him on the letterhead of the Brotherhood during May and July, 1944, and signed, during the absence of Mr. A. E. Farmer (another official of the Brotherhood), "E. Chambers, secretary to A. E. Farmer." After examining these letters we do not think that their admission was prejudicial to defendant. They were written at times when plaintiff was in active negotiations with Farmer and other officials of the Brotherhood concerning its purchase of the farm, were in answer to letters received from plaintiff with certain enclosures, and amounted to nothing more than acknowledgments of the receipt of plaintiff's letters and that their contents would be referred to Mr. Farmer upon his return, etc.

Finding no reversible error in the present record, the judgment of the superior court of October 20, 1952, is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

36584

36554

PEOPLE OF THE STATE OF ILLINOIS, ex rel. OSCAR NELSON, Auditor of Public Accounts,
Complainants,

v.

BUILDERS AND MERCHANTS BANK & TRUST CO.,
Defendant.

HILMER JOHNSON, Intervening Petitioner,
Appellant,

v.

WILL H. WADE, Receiver of said bank,
Respondent and Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

272 I.A. 621

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a proceeding against the Builders and Merchants Bank & Trust Co., brought in the superior court by the People at the relation of the Auditor of Public Accounts of Illinois, and in which Will H. Wade had been appointed receiver of the assets of the bank, Hilmer Johnson, on November 17, 1932, filed an intervening petition in which, after setting forth his claim against the bank in the sum of $1533.25, he prayed that the same be declared a "preferred claim," and ordered paid as such, out of the bank's assets in the receiver's hands. After the receiver had filed an answer, denying that petitioner was entitled to the relief prayed, there was a hearing before the court on a stipulation of facts, resulting in the entry of an order on December 2, 1932, that the "petition be and the same hereby is denied." From the order Johnson prosecutes the present appeal.

In a proceeding against the Bailiffs and Borough Bank & Trust Co., Stayed in the superior court by the Judge of the relation of the Auditor of Public Accounts of Illinois, and in which Will R. Vade had been appointed receiver of the assets of the bank, Elmer Johnson, on November 17, 1932, filed an intervening petition in which, after setting forth his claim against the bank in the sum of $[illegible], he prayed that the sum be declared a "preferred claim," and ordered paid as such, out of the bank's assets in the receiver's hands. After the receiver had filed an answer, stating that petitioner was entitled to the relief prayed, there was a hearing before the court on a stipulation of facts, resulting in the entry of an order on December 5, 1932, that the "petition be and the same hereby is denied." From the order Johnson prosecutes the present appeal.

It appears from the certificate of evidence, duly certified by the chancellor, that the stipulated facts are in substance as follows:

That prior to February 17, 1931, Johnson was indebted to the bank in the sum of $2450, evidenced by his collateral note, dated February 10, 1931, and due on May 11, 1931, (copy of note set forth); that as collateral Johnson had deposited with the bank a first mortgage of $4,000, which he "had previously requested the bank to sell for him;" that about February 15th the bank notified him that the "mortgage had been sold and to come in;" that on February 17th he called at the bank and talked with Martin Katte, the cashier, also with F. J. Schmidt, of the real estate department of the bank, and also with Ernest Lindskog; that Katte told him that "if he would purchase certain bonds from the bank for the difference due him from the proceeds of the sale of the $4,000 mortgage, he would be charged no commission on said sale;" that Johnson assented to the proposition and thereupon purchased from the bank three bonds, viz. "Nos. 51, 52 and 54, in the sum of $500 each, of the Ewald apartments, located at 4845-49 East Ravenswood avenue," and "received said bonds, also a check for $137.97, and a written statement of the transaction." (Copy of the statement set forth, dated February 17, 1931, showing a credit to him for the sale of said mortgage of $4,087.33; two debits against him, - one of $2416.11 for the net amount due the bank on said collateral note, and the other of $1533.25, for the purchaseprice of the three bonds together with accrued interest; and a net balance due him of $137.97, for which amount, as above stipulated, he then received a check). That prior to the consummation of the transaction Johnson "asked both Lindskog and Katte about the bonds and whether they were in good standing, and that he was told by Katte and Lindskog that they were;" that "nobody told him that the owner of the building had not then paid two (2) prepayments of principal which fell due on October 4, 1930;" and that he "first ascertained that these prepayments were not made about 2 or 3 months before the filing of the petition herein." And "Johnson also testified that the semi-annual installments of interest which fell due on October 4, 1930, were not paid by the owner."

It also appears from the certificate of evidence that "no evidence was offered on behalf of respondent" (the receiver); and that the above "was all the evidence offered and received on the hearing in the above entitled cause."

The theories of petitioner, suggested in the allegations of his petition and urged by his counsel in their brief and argument here filed, as to his right to recover, as a <u>preferred</u> claim out of assets of the bank in the receiver's hands upon tender of the three bonds, the amount he paid for them ($1533.25), are in substance (a) that a fraud was perpetrated upon him and (b) that

It appears from the certificate of evidence, only certified by the Commission, that the relevant facts are in substance as follows:

That prior to February 17, 1922, Johnson was indicted by the bank for the sum of [illegible], evidenced by his promissory note, dated February 16, 1922, due on May 11, 1922. (He at made not [illegible]) that an additional indebtedness had developed with the bank a first mortgage of $4,000, which he "had previously requested the bank to sell for him". Mr. Robert Kennedy from the bank testified his that the "Johnsons had been sold and to make 1921" that in February 1922 he visited in the bank and talked with Sheila Davis, the cashier, also with Z. L. Stanley, of the real estate department of the bank, and also with Robert Lindsay; that Davis told him that "it be worth mentioning certain debts from the bank for the difference due Mrs. from the proceeds of the sale of the $4,000 mortgage. He would be obliged to consideration in this matter" that Johnson attested to the correctness and truthfulness produced from the bank those notes, viz., Nos. 31, 32 and 34, in the sum of $300 each, of the Tenth Quartermaster, located at Sheridan Road Interurban avenue," and "receiving well beside, also a check for $137.47, and a written statement of the transaction." (copy of the statement was during February 17, 1922, showing a credit to him for the sale of said mortgage of $4,047.33; two debits against him, - one of $2012.11 for the net amount due the bank on said collateral note, the other of $2000.12, for the purchase-price of the three bonds together with interest; and a net balance due him of $33.47). For what amount, as above stated, he then received a check. That letter to the commission of the transaction (whose "added with lingering and hate about the bonds and whether they were in good condition, and that he was told by Davis and Lindsay that they were") that "nobody told him that the owner of the building had sold the bonds" and "Johnson said that he was told by Davis and Lindsay that they were" (the receiver); and that the "Lord Construction Company" (a) [illegible] of [illegible] 1922" and that the "Lord Construction that Lord Construction were not made about 2 or 3 months before the filing of the petition herein." and "Johnson also testified that the post-mortgage transactions of interest which fell due on October 1, 1921, were not paid by the owner."

It also appears from the certificate of evidence that "no evidence was offered on behalf of respondent" (the receiver); and that the above "was all the evidence offered and received on the hearing in the above entitled cause."

The claims of petitioner, recognized in the allegations of his petition and urged by his counsel in their brief and argument, must have filed, as to his right to recover, as a preferred claim out of assets of the bank in the receiver's hands upon tender of the three bonds, the amount he paid for them ($1800.00), and in substance (a) that a trust was perpetrated upon him and (b) that

the false representations by the bank officials to him as to the status of the bonds, and the suppression of the truth as affecting the entire issue thereof, create a "constructive trust" in his favor. In the brief here filed petitioner's counsel cite and discuss numerous cases as supporting said theories, and among them are: People ex rel. Nelson v. American Trust & Savings Bank, 262 Ill. App. 458, 463, and Housewright v. Steinke, 326 Ill. 398, 404. In the petition it is alleged that at the time petitioner purchased the bonds the semi-annual installments of interest, due on October 4, 1930, had not been paid by the owner of the property and that certain matured amounts on the principal had not been paid; that "defendant bank, by and through its officers and agents, did willfully, maliciously and fraudulently fail to disclose to petitioner the fact that said bond issue was in default;" that "had petitioner then and there known that the owner of the property had not paid the semi-annual installments of interest due on October 4, 1930, and was also in default in certain payments of principal, petitioner would not have purchased the bonds and paid the consideration therefor to defendant bank;" and that petitioner "is ready, willing and able to make return of the bonds to the receiver." It appears that the petition was filed on November 17, 1932, which is exactly 21 months after said transaction with the bank was consummated, viz., on February 17, 1931. There is no allegation in the petition as to when the receiver was appointed or that when he took possession of the assets of the bank any part of the sum of money, $1533.25, claimed by petitioner, then or thereafter came into the receiver's hands. And in the stipulation of facts, upon which the cause was tried, there is nothing to show any of these facts or even that there were any assets in the receiver's hands. And apparently no attempt was made by petitioner to trace into the receiver's hands, in any particular fund or otherwise, said sum of $1533.25, or any

the false representations by the bank officials to be as to the
status of the bank, and the suppression of the truth as affecting
the entire issue thereof, create a "substantiative fraud" in his
favor. In the joint bank fund petitioner's amount (for one
thousand dollars) was as supporting and therefore, assuming that
was "legally or fair," Eriksen v. Jenkins (1st C.A. 1924, 2d.
Cir. 1924, 3d, and Sherwood v. Jenkins, (1st C.A. 1924, 2d.
In the petition it is alleged that at the time petitioner purchased
the bonds the semi-annual installments of interest, due on October
1, 1921, had not been paid by the owner of the property and that
certain matters remedy on the pleadings had not been paid that
Fleetwood bank, by and through its officers and agents, did willi-
fully, maliciously and fraudulently fail to disclose to petitioner
the fact that said bond issue was in default" that "had petitioner
been and there known that the owner of the property had not paid
the semi-annual installments of interest for October 1, 1921,
and was also in default in certain payments of principal, petitioner
would not have purchased the bonds and paid the consideration there-
for to defendant bank;" and that petitioner "is ready, willing and
able to make return of the bonds to the receiver." It appears that
the petition was filed on November 27, 1923, which is nearly 21
months after said transaction with the bank was commenced, viz.,
on February 17, 1921. There is no allegation in the petition as
to when the receiver was appointed or that when he took possession
of the assets of the bank any part of the sum of money, $1320.28,
claimed by petitioner, then or thereafter came into the receiver's
hands. And in the stipulation of facts, upon which the cause was
tried, there is nothing to show any of those facts at even that
time were any assets in the receiver's hands. And again only an
attempt was made by petitioner to trace into the receiver's hands,
in any particular fund or otherwise, said sum of $1320.28, or any

part thereof.

In the brief and argument here filed by counsel for the receiver on April 14, 1933, wherein they urged that under the pleadings and stipulated facts the court's order denying the prayer of petitioner's petition was right and should be affirmed, one of the contentions made was that, in order to establish a preferred claim against the assets of an insolvent bank, it must be shown (in addition to showing a basis in equity for the imposition of an equitable lien or trust) that "certain definite property, either currency or other assets of the bank, segregated as the object of the lien or trust, has come into the hands of the receiver of the bank," or must be traced to a definite fund thereby augmented. In support of the contention counsel referred to certain decisions and holdings of courts of review in Illinois and in other jurisdictions. Among the cases cited are: Woodhouse v. Crandall, Rec'r, 197 Ill. 104, 116; People ex rel. Nelson v. Dahlgren State Bank, 264 Ill. App. 513, 517; People ex rel. Russel v. Michigan Avenue Trust Co., 232 Ill. App. 456, 458; Matter of Gavin v. Gleason, assignee, 105 N. Y. 256, 263; Macy v. Roedenbeck, 227 Fed. Rep. (C.C.A.) 346, 353; and Drovers Bank v. Keller, 85 Md. 493, 499-502. In the Dahlgren Bank case, supra, it appeared in substance that the bank was closed by the Auditor of Public Accounts in July, 1930; that in September, 1930, the circuit court of Hamilton county appointed a receiver, who took possession of the assets of the bank; that thereafter in the pending proceedings certain individuals (referred to in the opinion as "appellees") filed intervening petitions, asking that they be decreed preferred claims on the assets of the bank to satisfy the value of certain Liberty Bonds previously left with the bank for safekeeping; that after hearing evidence the chancellor held in their favor and decreed that they should have preferred claims on the general

assets of the insolvent bank; and that upon appeal the appellate court for the fourth district, for reasons stated in the opinion, reversed the decree and remanded the cause. It further appeared that appellees had deposited the Liberty Bonds, amounting to $18,100, with the bank, taking certificates therefor which stated that the bonds were to be returned to the several owners upon demand and the surrender of the certificates properly indorsed; that later the bank borrowed money from a bank in Evansville, Indiana, and to secure the loan pledged certain real estate bonds as collateral with the Indiana bank; and that still later the Dahlgren bank substituted for the real estate bonds, in the possession of the Indiana bank as collateral, the said Liberty Bonds belonging to appellees. It was conceded on the hearing that the Dahlgren Bank had no title to any of the Liberty Bonds or right to use them for its own purposes and that appellees gave to it no authority to do so, and that the bank's conversion of the bonds was unwarranted and wrongful. In the course of the appellate court's opinion it is said (264 Ill. App. p. 517):

"The question involved is whether appellees are entitled to have a trust impressed upon the assets of the Dahlgren State Bank which entitled them to a preferred lien thereon as against the general creditors. The relation of appellees to said bank, regarding these bonds, was that of trust, and hence fiduciary in character. (Woodhouse v. Crandall, 197 Ill. 104.) Furthermore, as a consequence of such relationship, whatever proceeds resulted from the sale or hypothecation of the bonds were impressed with a trust. Leach v. Sanborn State Bank, 203 Iowa 401, and cases cited.

In order that a preferential claim, based upon the theory of a trust, be enforced against the assets in the hands of the receiver of an insolvent bank, the trust fund must be traced into the assets. In Woodhouse v. Crandall, supra, (p. 111), the rule in Illinois is stated to be: 'So long as it can be identified, either as the original property of the cestui que trust or as a product of it, equity will follow it, and the right to reclaim it fails only when the means of ascertaining its identity fails.'

In cases where the trust property has been converted, and the proceeds can be traced into specific funds or specific identified property, the preferred claim cannot be allowed against the general assets of the trustee, but only as to such fund or assets as it is shown the proceeds of the trust property went into, and only to the extent they were placed therein." (Citing cases.)

amount of the insolvent bank's and later upon appeal the appellate court for the fourth district, for reasons stated in the opinion, reversed the decree and remanded the cause. It further expressed that appellees had dispossessed the Liberty Bank, amounting to $10,000, with the bank, taking certificates therefor which stated that the bank were to be returned to the account upon the return and the surrender of the certificates properly indorsed; that before the bank borrowed money from a bank in Evansville, Indiana, and to secure the loan pledged certain real estate bonds or collateral with the Indiana bank; and that until later the Indiana bank administrator for the real estate bonds, in the possession of the Indiana bank as collateral, the said Liberty Bonds belonging to appellees. It was conceded on the hearing that the Indiana Bank had no title to any of the Liberty Bonds or right to use them for its own purposes and that appellees gave to it no authority to do so, and that the bank's conversion of the bonds was unauthorized and wrongful. In the course of the opposite court's opinion it is said (Id. Op. p. 657):

"The question involved in another appellate court decision is pertinent. Some years ago the assets of the Indiana State Bank which consisted chiefly of a preferred lien thereon as against the general creditors. The relation of appellees to such bonds, regarding these bonds, was that of trust, and Liberty Bonds in character." (Goodhouse v. Goodhill, 327 Ill. 1.) Particularly as a consequence of such relationship, voluntary possession resulting from the sale or hypothecation of the bonds was tantamount to a trust. Jacob v. Jacob Trust Co., 327 Ill. 1.

In order that a preferential claim, based upon the theory of a trust, be enforced against the assets in the hands of the receiver of an insolvent bank, the trust fund must be traced into the assets. In Goodhouse v. Goodhill, supra, (p. 111), the rule in Illinois is stated as follows: "It need be shown to identify, either as the original property of the general use trust or as a product of it, equity will follow it, and the right is available if fully only when the means of ascertaining the identity fails."

In cases where the trust property has been converted, and the proceeds can be traced into specific funds or specific identified property, the preferred claim accrued in favor of the general assets of the insolvent, but only as to such fund or property as it is shown the proceeds of the trust property went into, and only to the extent they were placed therein." (Citing cases.)

Shortly after the brief and argument of the receiver's counsel had here been filed, counsel for petitioner on April 24, 1933, probably realizing that on the hearing before the chancellor petitioner had failed to make any proof of essential facts necessary to entitle him prima facie to a preferred claim on the bank's assets in the receiver's hands, filed a motion in this court for "diminution of the record * * and for leave to supply the same instanter," supporting the motion by suggestions and affidavit. Upon it appearing from counter suggestions filed that a general report or statement of the receiver (filed in the superior court clark's office on May 9, 1932, as to assets and liabilities of the defendant bank as of December 31, 1931, etc.), sought to be added to the present record, had not been introduced in evidence on the trial of the present cause or in any manner brought to the chancellor's attention, the motion was here denied on May 9, 1933.

In view of the stipulated facts and the authorities above referred to, our conclusion is that the superior court did not err in the entry of the order of December 2, 1932, appealed from, and, accordingly, it will be affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Nearly after the brief and judgment of the respondent's counsel had been filed, request for petitioner to file a reply, [illegible] petitioner had failed to make any proof of essential facts necessary to entitle the petitioner to a [illegible] claim on the body's assets in the receiver's hands, filed a motion to take court to "dismissal of the record" and for leave to supply the same [illegible] supporting the motion by affidavits and attorneys.

Upon it appearing from counsel's affidavit that a general report of disposal of the receiver filed in the superior court clerk's office on May 9, 1931, as to assets and liabilities of the [illegible] such as of December 31, 1930, [illegible], counsel is to assume in the present record, but not been introduced in evidence on the trial of the present cause or in any manner brought to the chancellor's attention, the motion was duly denied on May 9, 1932.

In view of the stipulated facts and the conclusions above reached by our consideration in that the superior court did err in the entry of the order of December 2, 1932, appealed from, and, accordingly, it will be reversed.

[illegible]

[illegible]

118 A

36621

JAMES TOOMEY, THOMAS TOOMEY and MARY TOOMEY,
Appellees,

v.

JOHN E. TOOMEY, as executor of the last will and testament of MARY L. O'CONNOR, deceased, and as an individual,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

272 I.A. 621

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a decree of the superior court of Cook county, entered December 31, 1931, wherein the court, following the verdict of a jury, ordered and adjudged that the instrument in writing, purporting to be the last will and testament of Mary L. O'Connor, deceased, and admitted to probate in the probate court of Cook county on March 19, 1929, is "not her last will and testament," that she "did not affix her signature thereto," that at the time of its alleged execution "she was not of sound mind and memory," and that the instrument and the probate thereof "are hereby set aside and declared and decreed to be null and void."

The appeal was first perfected in the Supreme Court, but on October 22, 1932, the cause was transferred to this appellate court, for reasons stated in the opinion of the Supreme Court (Toomey v. Toomey, 350 Ill. 162), and was here docketed on February 14, 1933.

The instrument in question, introduced in evidence by the proponent, John E. Toomey (the brother of complainants) purports to be under the hand and seal of Mary L. O'Connor, and to have been executed by her on November 10, 1928, in the

[illegible]

[illegible]

[illegible]

presence of two subscribing witnesses, James H. Winkelman and Richard W. Barnes, whose signatures as such are on the instrument. After the usual preamble the instrument reads as follows:

"First: I order and direct that my executor hereinafter named pay my funeral expenses, my doctors' bills and all my just debts as soon after my decease as can conveniently be done.

Second: All the rest, residue and remainder of my estate, whether real, personal or mixed, of whatever nature, character and description, and wheresoever situated, of which I may die seized or possessed, I give, bequeath and devise to my nephew, John E. Toomey, who is also my God-son.

Third: I hereby nominate and appoint my nephew, John E. Toomey, sole executor of this my last Will and Testament, and order and direct that no bonds shall be required of him as such executor.

Lastly: I hereby revoke any and all former Wills and Testaments by me made."

In complainants' original bill, filed on March 12, 1930 (i.e., within one year after the admission of the instrument to probate in the probate court) the instrument is set out in full. They alleged in substance that the purported testatrix was their aunt; that she died on January 22, 1929, leaving the three complainants and John E. Toomey, her nephew, "as her heirs-at-law and legal representatives;" that when she died she was "seized and possessed of property of the value of $14,000, the exact amount of which complainants are not advised;" that at the time the instrument was executed she "was not of sound mind and memory and was wholly incapable of understanding or appreciating her relations to those who have a claim upon her bounty, and was incapable of making a just and proper testamentary disposition of her estate;" that when she died she "was at least 86 years old and for a long time prior thereto was of unsound and feeble mind and memory;" that on December 29, 1928, she became an inmate of the Cook County Hospital; and on January 16, 1929, she was taken from there and committed to the Cook County Psychopathic Hospital for the Insane, from which, about four days prior to her death, she was discharged and taken away by John E. Toomey, under whose control and influence she remained until her

presence of two subscribing witnesses, James E. Pinkham and Stephen F. Hussey, whose signatures we wish are on the instrument.

After the usual preamble the instrument reads as follows:

"First: I order and direct that my executor herein-after named pay my funeral expenses or testator's bills and all my just debts to wit: after my decease as soon conveniently be done.

Second: All the real, personal and rem-ainder of my estate, whether real, personal or mixed, of whatever nature and character and description, and wherever situated, of which I may die seized or possessed, I give, bequeath and devise to my nephew, John E. Tenney, who is also my executor.

Third: I hereby constitute and appoint my nephew, John E. Tenney, sole executor of this my last will and testament, and order and direct that no bonds shall be required of him as such executor.

Lastly: I hereby revoke any and all former wills and testaments by me made."

In complainants' original bill, filed on March 12, 1920 (i.e., within one year after the admission of the instrument to probate in the probate court) the instrument is set out in full. They alleged in substance that the purported testatrix was then mentally ill; she died on January 21, 1920, leaving the three complainants and John E. Tenney, her nephew, "no her heirs-at-law and legal representatives;" that when she died she was "mental and personal property of the value of $10,"; the exact amount of which complainants are not actually; that at the time the instrument was executed she "was not of sound mind and memory and was totally incapable of understanding or appreciating her relations to those who have a claim upon her bounty, and was incapable of making a just and proper testamentary disposition of her estate;" that when she died she "was at least 88 years old and for a long time prior thereto was of unsound mind and memory" that on December 20, 1918, she became an inmate of the Cook County Hospital; and on January 16, 1920, she was taken from there and committed to the Cook County Psychopathic Hospital for the Insane, from which, about four days prior to her death, she was discharged and taken away by John E. Tenney, under whose control and influence the testatrix was

death; and that at the time of the execution of the instrument and prior thereto said Toomey "used and exercised many undue acts and fraudulent practices and resorted to misrepresentations to induce her to execute said instrument," etc. The prayer of the bill is in substance that the instrument and the probate thereof be "set aside and declared null and void, * * and her estate be distributed among her heirs according to law." Thereafter defendant's answer to the bill and complainants' replication to the answer were filed.

On November 9, 1931, complainants' motion, supported by affidavit, for leave to file an amended bill was allowed by the court and an amended bill was filed (i.e., more than one year after the admission of the instrument to probate). In the affidavit, made by one of complainants' solicitors, it is stated in substance that at the time of the filing of the original bill neither affiant nor complainants nor any of their solicitors had any knowledge that said instrument was "forged and fictitious;" that during July, 1931, at the beginning of the court vacation, complainants and affiant first became suspicious of that fact; that recently, acting with diligence, they have verified their suspicions that said instrument is forged and fictitious; and that unless the court permits complainants to file an amended bill a grave injustice will be done.

In the amended bill substantially the same allegations as in the original bill are made, to the effect that the instrument is not the will of Mary L. O'Connor because at the time of its execution and for a long period prior thereto she was of unsound mind and memory, etc. And the further allegations are made that the instrument "is not her last will and testament; that it is fraudulent, fictitious and forged; that it was not signed by Mary L. O'Connor, or by any person in her presence or by her direction;

[illegible] and take on the form of the assembly of the instrument
and write down-only Tomby "does not matter" many [illegible]
the [illegible] provisions are inserted to [illegible]
[illegible] for to execute said instrument", etc. The purpose of the
will is in substance that the instrument and the provisions [illegible]
be "not made and declared null and void." [illegible] Therefore
determined, upon the [illegible] provisions to
the [illegible] will.

On November 4, 1924, [illegible] mailed
an affidavit, for [illegible] to file an amended will was signed by the
[illegible] and an amended will was filed [illegible] after
the submission of the instrument to probate). In the affidavit,
made by one of complainants' solicitors, it is stated in substance
that at the time of the filing of the original will counsel of
the complainants [illegible] of their [illegible] and [illegible]
made [illegible] "forged and fictitious" [illegible]
[illegible] of the [illegible] and
affidavit [illegible] [illegible] with
[illegible] forged and fictitious; and that unless the [illegible]
complainants to file an amended bill a prima facie [illegible] will be [illegible]

In the amended bill substantially the same allegations
as in the original bill are made, to the effect that the instrument
in [illegible] the will of Mary [illegible] at the time of its
execution and for a long period prior thereto was of unsound
mind and memory, etc. And the further allegations are made that
the instrument "is not her last will and testament; that it is
fraudulent, fictitious and forged; that it was not signed by Mary
L. [illegible], or by any person in her presence or by her directions

that it was never acknowledged by her to be her act and deed; and that it was not attested or signed by two competent witnesses in her presence or at her request." In his answer to the amended bill defendant denied all of its material allegations and to the answer complainants filed a replication.

On the trial before a jury, in accordance with the provisions contained in the first proviso of section 7 of the "Act in regard to Wills"(Cahill's Stat. 1929, Chap. 148, p. 2679), much oral and documentary evidence was introduced by the parties. On the issues whether the instrument was the will of Mary L. O'Connor, whether she affixed her signature to it, and whether at the time of its claimed execution on November 10, 1928, she was of sound mind and memory, the evidence was conflicting. At the conclusion of the evidence and after the jury had been instructed by the court and after they had been directed to return special findings on three "issues of fact," they, on December 18, 1931, returned the following general verdict:

"We, the jury, find from the evidence that the writing produced and read in evidence, purporting to be the last will and testament of Mary L. O'Connor, deceased, is not the will of said Mary L. O'Connor, deceased."

And they answered "No" to each of said issues of fact, as presented by the following questions:

"Form No. 1. Is the writing produced and read in evidence, purporting to be the last will and testament of Mary L. O'Connor, deceased, the will of Mary L. O'Connor?

Form No. 2. Did Mary L. O'Connor, deceased, affix her signature to the writing produced and read in evidence purporting to be her last will and testament?

Form No. 3. Was the said Mary L. O'Connor, deceased, at the time of the alleged execution of the writing produced and read in evidence purporting to be her last will and testament, of sound mind and memory?"

One of defendant's counsels' contentions, relied upon for a reversal of the decree is that the superior court of Cook county was without jurisdiction of the subject matter. The argument

is in substance that, as provided in said proviso of the above section of the statute, the issue mentioned "shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded," etc., and that, hence, the special statutory jurisdiction is not conferred upon the superior court of Cook county, but only upon the circuit court of the county. In view of numerous decisions of our Supreme Court we cannot agree with the contention or argument. In Eugene Dietzgen Company v. Industrial Commission, 269 Ill. 159, it appears that the Commission affirmed an award of compensation made to Martha T. Sanders against the Company under the Workmen's Compensation Act; that a writ of certiorari was sued out of the superior court of Cook county by the Company to review the award; that on motion of the petitioner the superior court quashed the writ and dismissed the petition for want of jurisdiction in the superior court to review the action of the Commission; and that upon writ of error, sued out by the Company to review the judgment of the superior court, our Supreme Court reversed that judgment and remanded the cause with directions to the superior court "to proceed to a determination of the cause." In the opinion our Supreme Court said (p. 160):

"Under paragraph (f) of section 19 of the Workmen's Compensation act the decision of the Industrial Board is conclusive unless reviewed in the manner in that paragraph provided, and the manner provided is by writ of certiorari from the circuit court of the county where any of the parties defendant may be found or by suit in chancery commenced by any party in interest in the circuit court of such county. The defendant in error contends that the jurisdiction conferred upon circuit courts by the Workmen's Compensation act to review the proceedings of the Industrial Commission is a special statutory jurisdiction, which is exclusive in the circuit court and cannot be exercised by the superior court of Cook county.

We have had before us numerous cases in which the question of the jurisdiction of the superior court of Cook county has been determined and have decided that the superior court and the circuit court have the same organization, jurisdiction and powers; that under the constitution there is no distinction between them except in name; that they are practically branches of the same court and that the superior court is in legal effect a circuit court, and

where a special statutory jurisdiction is conferred on either court the other will by the same act acquire a like jurisdiction. Jones v. Albee, 70 Ill. 34; Hall v. Hamilton, 74 id. 437; Samuel v. Agnew, 80 id. 553; Chicago and Northwestern Railway Co. v. Chicago and Evanston Railroad Co., 112 id. 589; Berkowitz v. Lester, 121 id. 99; Cobe v. Guyer, 237 id. 516."

Defendant's counsel also contends in substance that reversible error was committed by the court in allowing complainants, as contestants of the validity of the will, to file their amended bill on November 9, 1931 (i.e., more than one year after probate), and for the reason that the amended bill "set up an entirely new cause of action, viz., 'forgery,' which has no connection whatever with the ground set up in the original bill, viz., 'want of testamentary capacity of the testatrix.'" We are of the opinion that the contention is without merit. (See Sinnet v. Bowman, 151 Ill. 146, 152; Stephens v. Collison, 249 id. 225, 236; Saterman v. Hall, 298 id. 75, 84.) In the Sinnet case it is said (p. 152):

"We are not prepared to hold that the amendment to the bill did in fact present a new cause of action, so as to be tantamount to the filing of a new bill. The gist of the complaint made by the original bill was, that the paper produced by the proponents was not the will of the testator, and the same is true of the amended bill. In support of their complaint, the complainants, by their original bill, alleged the want of testamentary capacity in the testator at the time the will was executed, and by their amended bill, they support it by the further allegation that the execution of the will was procured by the exercise of undue influence upon the testator. We do not regard this as setting up what is in the nature of a substantively new cause of action, but as an attempt to support the cause of action already alleged upon a new ground."

In the Stephens case it is said (p. 236):

"It has been held that the statute authorizing the contest of a will in chancery is not properly a limitation law; that it is merely a grant of jurisdiction to be exercised within the time specified, and not a limitation upon the exercise of a jurisdiction already conferred; but it has also been held that if the suit was begun within the time prescribed, the jurisdiction extends to the investigation of every ground upon which the validity of the will may be assailed, even though some of the grounds may not have been properly set forth in the bill until after the expiration of the time within which the suit is required to be commenced. (Sinnet v. Bowman, 151 Ill. 146.) While the statute authorizing the contest of a will in chancery is not properly a limitation law but is a statute conferring jurisdiction, it goes further than merely conferring jurisdiction and prescribes the time within which the jurisdiction conferred must be invoked. If the jurisdiction conferred is invoked by filing the bill within the time

where a special testamentary jurisdiction is conferred on either court (as often will be the case) we may expect a fair interpretation. Lewis v. Jones, 70 Ill. 141 (1873); Hastings v. Hastings, 76 Ill. 212 (1875); Gibson and Gibsonville Village Co. v. Gibson, 81 Ill. 602; Fulton and Fulton v. Fulton, 48 Ill. 171; Fulton v. Fulton, 48 Ill. 171; Ryan v. Ryan, 87 Ill. 116.

Intendment's remarked also courts, in indicating that reasonable error was committed by the court in allowing complainants, as guardians of the validity of the will, to file their bill according with on December 9, 1913 [illegible] more than four after probate, and for the reason that the amended bill "set up an entirely new claim of action, viz., 'forgery,' which has no connection whatever with the grounds set up in the original bill, viz., 'want of testamentary capacity of the testatrix.'" In use of the opinion that the contestation is without merit. (See Gibson v. Gibson, 121 Ill. 148, 151; Lawson v. Collins, 40 Ill. 408, 414; Lawson v. Hill, 114 Ill. 73, 84.) In the Gibson case it is said (p. 150):

"We are not prepared to hold that the testament in the will did in fact present a new cause of action, so as to be subject to the filing of a new bill. The rule of the complainants may be the filing of a new bill. The rule of the complainants may by the original bill was, that the paper produced by the proponents was not the will of the testator, and the issue in view of the contested will. In support of their contention, the complainants, by their original bill, alleged the want of testamentary capacity in the testator at the time the will was executed, and by their amended bill, they support it by the further allegation that the execution of the will was procured by the exercise of undue influence upon the testator. We do not regard this as putting up that by in the nature of a substantively new cause of action, but as an attempt to support the cause of action already alleged upon a new ground."

In the Lawson case it is said (p. 408):

"It has been held that the statute authorizing the contest of a will in chancery is not properly a limitation law; that it is merely a grant of jurisdiction to be exercised within the time specified, and not a limitation upon the exercise of a jurisdiction already conferred; but it has also been held that if the suit was begun within the time prescribed, the jurisdiction vested in the investigation of every ground upon which the validity of the will may be assailed, even though some of the grounds may not have been properly set forth in the bill until after the expiration of the time within which the bill is required to be commenced. (Lawson v. Lawson, 101 Ill. 189.) While the statute authorizing the contest of a will in chancery is not properly a limitation law, but is a statute conferring jurisdiction, it does further that the time within which the bill is required to be commenced, [illegible] jurisdiction and prescribes the time within which the jurisdiction conferred must be invoked. If the jurisdiction conferred is invoked by filing the bill within the time

limited the bill must be entertained, and the failure to make a necessary party a defendant to the bill within a year when other necessary parties are made defendants is not a failure to invoke the jurisdiction within a year."

In the Waterman case it is said (p. 84, italics ours):

"The newly discovered evidence does not raise a new issue but is of facts tending to show the will produced was not the will of Judge Waterman. It is evidence of facts not known to appellant before the trial of the original case. Had it come to appellant's knowledge before the trial the bill might properly have been amended and the amendment would not have presented a new cause of action."

Defendant's counsel also contends that the court erred in allowing, over defendant's objection, the admission in evidence of the record of certain proceedings in the probate court, offered by complainants, as to the appointment of a conservator of the estate of Mary L. O'Connor, including (a) the petition of John E. Toomey, filed December 18, 1928 (about five weeks after the execution of the purported will), praying for such appointment; (b) the verdict of the jury, filed January 9, 1929, finding that she is "a distracted person," is "aged about 86 years," and is "incapable of managing and controlling her estate;" and (c) the appointment on that day of the Stock Yards Trust & Savings Bank as conservator. We cannot agree with the contention. Defendant and several witnesses called by him had testified as to the mental competency of Mary L. O'Connor during the period of the pendency of the conservatorship, and there was conflicting evidence on this question offered by complainants. While the record was not conclusive upon the question of the mental competency of Mary L. O'Connor on November 10, 1928 (the date of execution of the purported will), we think it was proper to be admitted before the jury for what it was worth. (See Holliday v. Shepherd, 269 Ill. 429, 434-5; Belz v. Piepenbrink, 112 id. 528, 535; Pendarvis v. Gibb, 328 id. 282, 292.)

Defendant's counsel also complains of certain other evidence, offered by complainants and admitted by the court, as being erroneously admitted. No useful purpose will be served in

discussing in detail the several points made. Suffice it to say that we have considered them and are of the opinion that in none of the rulings was reversible error committed.

Counsel also contends in substance that the general verdict of the jury, as well as their special findings on the three issues of fact as presented to them, are manifestly against the weight of the evidence. After a careful consideration of all the evidence we are of the contrary opinion.

Complaint is made that the court erred in giving to the jury the first instruction, which related to the rule as to the burden of proof, and also erred in refusing to give a certain other instruction, offered by defendant, relating to the same subject. Counsel's argument is that although said first instruction "is a good one as far as it goes," it is not a complete one and tended to "mislead the jury on the question of burden of proof," and that defendant (proponent) was entitled to an instruction that "if the proponent made a prima facie case, the burden of proof shifted to the contestants." We are of the opinion that the court did not err in the particulars as argued. In Grosh v. Acom, 325 Ill. 474, it is said (pp. 490-1): "It is the law of this State that the burden of proof is on the proponents in a case to contest a will, and that in such a contest they must establish the will as the last will and testament of the testator by a preponderance of all the evidence in the case. This court has frequently so held. We have also held that the burden of proof never shifts during the course of the trial but remains with the proponents to the end. The burden of introducing evidence may, and does, shift to the contestant during the course of the trial, but the burden of proof, in the sense of the obligation to establish the truth of the claim that the will is the will of the testator by a preponderance of the evidence, rests throughout the trial upon the proponents, who are the parties asserting the

disposed to treat the "burden of proof" matter, rather it is suf-
ficient to have considered that one of the opinions which is made
of the evidence can reasonable under consideration.

Counsel also contends, in substance, that the general
verdict of the jury, as well as their special finding of the
ultimate issues of fact as presented in their "statistic" finding
the weight of the evidence. This is simply an assertion of all
the evidence as one of the necessary opinion.

Complaint is made that the court erred in giving to the
jury the first instruction, which reads in the words as it
begins of proof, and also error in refusing to give a certain other
instruction, offered by defendant, relating to the same subject.
Counsel's argument is that although such first instruction "is a
good one so far as it goes," it is not a complete one and tended to
"mislead the jury on the question of burden of proof," and that
defendant (proponent) was entitled to an instruction that "if the
proponent made a prima facie case, the burden of proof shifted to
the contestants." We are of the opinion that the court did not
err in the particulars as stated. In Black v. Jones, 108 Ill. 474,
it is said
(p. 47-2): "It is the law of this State that the burden of proof
as to the proponents in a case to probate a will, and that in such
a proceeding they must satisfy the mind of the last will and testament
of the testator by a preponderance of all the evidence in the case.
This court has frequently so held. We have also held that the
burden of proof never shifts during the course of the trial but re-
mains with the proponents to the end. The burden of introducing
evidence may, and often, shift in the contestant during the course
of the trial, but the burden of proof, in the sense of the obligation
to establish the truth of the claim that the will in the will of
the testator by a preponderance of the evidence, never shifts from
the trial upon the proponents, who are the parties asserting the

affirmative of the issue." (Citing Sellers v. Kincaid, 303 Ill. 216, 225-6; Donovan v. St. Joseph's Home, 295 id. 125, 131.)

Counsel also contends that the court erred in refusing to give certain other instructions offered by defendant. After considering all of these instructions, as well as the given instructions, we do not think that any reversible error was committed in the refusals complained of. In our opinion the jury were fairly and properly instructed.

Finding no reversible error in the record the decree of the superior court of December 31, 1931, appealed from, is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

affidavits of the Bureau' (Lilly [illegible] on Behalf, 2nd Cir. 1964, 328-9) [illegible] (Mr. Justice's Speech, 1971 Lib. Lib. 1981)

[illegible] I believe that the court erred in refusing to give certain other instructions asked by defendants. After summarizing all of these instructions, it will be the plain intentions, we do not think that any prejudicial error was committed by the refusals complained of. In our opinion the jury was fairly and properly instructed.

Finding no reversible error in the record the judgment of the Superior Court of Delaware, dated, upholding claims in affirmed.

Justices T. C. and Daniels, c.c. concur.

30640

WILLIAM BRANDENBURG CO.,
a Corporation,
Complainant,

vs.

MARTHA MELVIN et al.,
Defendants.

On Appeal of HOLLISTER-WHITNEY COMPANY, a Corporation,
Intervening Petitioner and Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

119

272 I.A. 621

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by the Hollister-Whitney Company, a corporation, (hereinafter referred to as the Hollister Co.) to reverse an order or decree of the circuit court, entered in a pending mechanic's lien proceeding on December 27, 1932, wherein the court sustained the general demurrer of Martha Melvin and others to its amended intervening petition filed on November 16, 1932, and dismissed said petition for want of equity.

On December 28, 1929, the William Brandenburg Co. filed its bill to foreclose a claimed mechanic's lien on the premises involved, improved with an apartment building and located at 337 Wolfram street, Chicago, of which Martha Melvin and Gertrude Nabryl were the owners and the Chicago Title & Trust Co., as trustee, was the mortgagee. On October 17, 1930, by leave of court, the Hollister Co. filed an answer to the bill and an intervening petition, and the court ordered that such filing was to be without prejudice to the reference of the cause to the master and that petitioner was to have the benefit of such testimony as had already been taken before him. In the answer the Hollister Co. denied that complainant or any intervening petitioner had a lien paramount to its lien, and alleged that its lien was "of equal priority with complainant's and all other

[illegible]

WILLIAM [illegible] CO.,
a Corporation,
Complainant,

vs.

[illegible] et al.,
Defendants.

[illegible] OF COMMERCE-TRUSTEE
[illegible], a Corporation,
Intervening Petitioner and
Appellant.

[illegible]

[illegible] DISTRICT COURT
[illegible] COUNTY.

[illegible] 622 I.A. 621

[illegible] JUSTICE DANIEL MCGINNIS DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by the Building-Mortgage Company, a corporation, (hereinafter referred to as the Building Co.) to reverse an order or decree of the circuit court, entered in a pending mechanic's lien proceeding on December 27, 1932, wherein the court vacated the general demurrer of Martin Melvin and others to the amended intervening petition filed on November 16, 1932, and dismissed said petition for want of equity.

On December 22, 1930, the William Prudentory Co. filed its bill to foreclose a claimed mechanic's lien on the premises involved, improved with an apartment building and located at 6327 Dorchester street, Chicago, of which Martin Melvin and others were the owners and the Chicago Title & Trust Co., as trustee, was the mortgagee. On October 17, 1931, by leave of court, the Building Co. filed an answer to the bill and an intervening petition, and the court ordered that such filing was to be without prejudice to the reference of the cause to the master and that petitioner was to have the benefit of such testimony as had already been taken before him in the cause the Building Co. moved that complainant or any intervening petitioner had a lien pursuant to its lien, and alleged that its lien was for such priority over complainant's and other

lien claimants similarly situated." In its intervening petition it alleged in substance:

> That it is an Illinois corporation with principal office and place of business at Quincy, Illinois; that prior to March 12, 1929, the said owners of the premises authorized and permitted their respective husbands, W. L. Melvin and V. H. Habryl, to make various contracts for the improvement of the premises; that on March 12, 1929, said owners authorized and knowingly permitted their husbands to enter into a written contract with the Hollister Co., whereby it was to furnish and install a passenger elevator, in accordance with plans and specifications submitted on February 15, 1929, in the building then being erected on the premises, for the sum of $2800, as is more particularly shown by a copy of the contract attached (Exhibit A) and made a part of the petition; that in accordance with the contract and specifications petitioner furnished and installed the elevator in the premises, together with all required labor and material; that "on, to-wit: August 2, 1929," it completed its work; that said owners are entitled to a credit of $2,000, leaving now due and unpaid a balance of $800, together with legal interest from date of completion; that the elevator became an integral part and portion of the building on the premises, and petitioner is entitled to a mechanic's lien on the improved premises for said balance; that "on, to-wit, April 1, 1930," petitioner caused to be filed with the clerk of the circuit court of Cook county a statement for a mechanic's lien in the form required by statute, "a copy of which is hereto attached and marked 'Exhibit B' and made a part of this intervening petition."

In the copy of the contract (Exhibit A) it appears that it is in the form of a partly printed and partly written proposal, signed by the Hollister Co. by an agent, and dated February 15, 1929. Below the signature is the following acceptance of the proposal, signed by the respective husbands of the owners: "The above proposal is hereby signed and accepted in duplicate this March 12th, 1929." In the copy of the statement of claim for lien (Exhibit B), verified by the vice president of petitioner under date of April 1, 1930, and made a part of the intervening petition, it is alleged that the Hollister Co. filed a claim for lien against the owners and their respective husbands (naming them); that on February 15, 1929, said owners were the owners of record of the premises (describing them); that on February 15, 1929, the claimant made a contract with the owners, Gertrude Habryl and Martha Melvin, "through V. H. Habryl and W. L. Melvin as their agents then and there authorized and knowingly permitted by said Gertrude Habryl and Martha Melvin to make said

Item claimants similarly stated." In the intervening petition it stated in substance:

That it is an Illinois corporation with principal office and place of business at Quincy, Illinois; that prior to March 12, 1938, the well owners of the produce authorized and permitted their respective products, K. L. Kelvin and V. K. Cherry, to make various negotiations for the improvement of the premises; that on March 12, 1938, said owners authorized and knowingly permitted their respective to enter into a written contract with the Petitioner to, whereby it would install and install a pneumatic elevator, in accordance with plans and specifications submitted on February 12, 1938, in the building then being erected on the premises, for the sum of $1800, including that being erected on the premises, for the sum of $1800, as is more particularly shown by a copy of the contract attached (Exhibit A) and made a part of the petition; that in accordance with the contract and specifications petitioner furnished and installed the elevator in the premises, together with all required labor and material; that the, therefore, owners, it contributed its work; that said owners are entitled to a credit of $1,800, thereby now due and unpaid a balance of $900, together with legal interest from date of completion; that the elevator became an integral part and parcel of the building on the premises, and petitioner is entitled to a mechanic's lien on the improved premises for said balance; that "on, March 2, 1938," petitioner caused to be filed with the clerk of the circuit court of Cook county a statement for a mechanic's lien in the form required by statute, "a copy of which is hereto attached and marked 'Exhibit B' and made a part of this intervening petition."

In the copy of the contract (Exhibit A) it appears that it is in the form of a partly printed and partly written proposal, signed by the Petitioner Co. by an agent, and dated February 12, 1938. Below the signature is the following acceptance of the proposal, signed by the respective husbands of the owners: "The above proposal is hereby signed and accepted in duplicate this March 12th, 1938." In the copy of the statement of claim for lien (Exhibit B), verified by the vice president of petitioner under date of April 2, 1938, and made a part of the intervening petition, it is alleged that the Petitioner Co. filed a claim for lien against the owners and their respective husbands (sic); that on February 12, 1938, said owners were the owners of record of the premises (describing them); that on February 12, 1938, the claimant made a contract with the owners, respective husbands and parties named, "namely K. L. Kelvin and V. K. Kelvin as their agents then and there authorized and knowingly permitted by said respective husbands and parties Kelvin to make said

contract," to furnish and install a passenger elevator in accordance with plans and specifications for the building then being erected or improved on said land, for the sum of $2800, and afterward "on, to-wit, March 8, 1930 completed thereunder all required work to be done by said contract"; and that the owners are entitled to credits to the extent of $2,000, leaving due and owing a balance of $800, "for which with interest the claimant claims a lien on said land and improvements." It will be noticed that there is a discrepancy between the allegations in the intervening petition and in the statement of claim for lien as to the completion of the work under the contract. In the former the completion is stated to be "on, to-wit, August 2, 1929," and in the latter "on, to-wit, March 8, 1930."

On October 11, 1932, shortly after the master's report and supplemental report (unfavorable to its claim for lien) had been ordered by the court to be filed, the Hollister Co., by leave of court, filed an amendment to its intervening petition, wherein, after the statement that it had completed its work under the contract on "August 2, 1929," the following sentence was added: "Except adjustments thereon (the elevator) and the furnishing and installing of the automatic gate operator, which said adjustments were made and the automatic gate operator completely installed on March 6, 1930." To the petition, as so amended, the owners, their respective husbands and the mortgagee (Chicago Title & Trust Co., as trustee) filed a general demurrer, which on November 7, 1932, the court sustained, but granted leave to the Hollister Co. to file an amended intervening petition. On November 16, 1932, the Hollister Co. filed its amended petition, in which are contained substantially the same allegations as in the original petition except as to the time of the completion of its work under the contract. The allegation is: "That thereafter, on, to-wit, March 6, 1930, it completed the said installation of said

contract," to furnish and install a passenger elevator in accordance with plans and specifications for the building then being erected or improved on said land, for the sum of $8000, and after-wards "on, to-wit, March 8, 1926 completed the work all required such to be done by said contract"; and that the owners are entitled to credits to the extent of $3,000, leaving due and owing a balance of $5000, "for which sum interest the claimant claims a lien on said land and improvements." It will be noticed that there is a discrepancy between the allegations in the intervening petition and in the statement of claim for lien as to the completion of the work under the contract. In the former the completion is stated to be "on, to-wit, August 8, 1926," and in the latter "on, to-wit, March 8, 1926."

On October 11, 1926, nearly after the master's report and supplemental report (unfavorable to its claim for lien) had been attacked by the owner in the Circuit Court of Cook County, by leave of court, filed an amendment to its intervening petition, wherein, after the statement that it had completed its work under the contract on "August 8, 1926," the following appears verbatim: "Claimant additionally furnish (the elevator) and the furnishing and installation of the automatic gate operator, which said additionals were made and the automatic gate operator completely installed on March 8, 1926." In the petition, as so amended, the owners, their respective mortgagees and the mortgagee (Chicago Title & Trust Co., as Trustee) filed a general demurrer, which on November 7, 1926, the court sustained, but granted leave to the Holistor Co. to file an amended intervening petition. On November 16, 1926, the Holistor Co. filed its amended petition, in which are contained substantially the same allegations as in the original petition except as to the time of the completion of its work under the contract. The allegation is: "that thereafter, to-wit, March 8, 1926, it completed the said installation of said

elevator and all work in connection therewith in accordance with said contract." And to the amended petition are attached as exhibits, and made a part of it, copies of the contract and of the statement of its claim for lien, filed on April 1, 1930, with the clerk of the circuit court,-- the same as were attached to the original petition. To the amended petition the owners, their respective husbands and said mortgagee filed a general demurrer, and after argument the court, on December 27, 1932, sustained the demurrer and dismissed said petition for want of equity, from which order or decree the present appeal is prosecuted, as first above mentioned.

So far as the present record discloses the order or decree is based solely upon the allegations contained in the amended petition. It does not appear that any action had been taken by the court on the master's report. And counsel in their briefs here filed seem to agree that the reason of the court's action in sustaining the demurrer was that the court was of the opinion in substance that the amended petition stated a new cause of action as to the time of petitioner's completion of the work, viz., on March 6, 1930, instead of on August 2, 1929, as alleged in the original petition, and that said amended petition was filed so late that petitioner's right to a lien had been lost.

After a careful consideration of the pleadings, and of sections 7 and 18 of the Mechanics' Lien Act, and of numerous authorities, we have reached the conclusion that the court erred in sustaining the demurrer to the amended petition and in dismissing the same for want of equity. While in the original petition, filed on October 17, 1930, it is stated that the work of the Hollister Co. was completed on August 2, 1929, it appears that in its statement of claim for lien (filed with the clerk of the circuit court on April 1, 1930, under said section 7 of the Lien Act), a copy of

[illegible] and all very is [illegible] [illegible] [illegible]

which was made a part of the petition, it is stated that the work was completed on March 8, 1930. Treating the allegation as to completion of the work on "August 2, 1929" as surplusage, we are of the opinion that the original petition stated a good cause of action for a mechanic's lien. (See Otterson v. Zerowski, 267 Ill. App. 91, 95; Beaudry v. Bell, 250 Ill. App. 468, 472-3; Smith v. Adcock, 209 Ill. App. 277, 281.) And we are further of the opinion that the amended petition, wherein the statement as to the date of the completion of the work is changed from "August 2, 1929" to "March 6, 1930," is not a statement of a new cause of action. (See Burgoyne v. Pyle, 261 Ill. App. 356, 363-4; Eisendrath Co. v. Gebhardt, 222 Ill. 113, 116; Treloar v. Hamilton, 225 Ill. 102, 105; Schmeier Lumber Co. v. Knight, 350 Ill. 248, 253.)

Accordingly, the order or decree of the circuit court of December 27, 1932, appealed from, is reversed, and the cause is remanded with directions to the court to overrule the demurrer to the amended intervening petition of the Hollister-Whitney Company.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

which was made a part of the petition, it is argued that the work was completed on March 2, 1926. Treating the allegation as to completion of the work on "August 2, 1926" as surplusage, we are of the opinion that the original petition stated a good cause of action for a mechanic's lien. (See Ottaway v. Ferguson, 867 Ill. App. 91, 98; Beatty v. Bell, 98 Ill. App. 488, 472-3; Smith v. Adams, 98 Ill. App. 277, 282.) And we are further of the opinion that the amended petition, wherein the statement as to the date of the completion of the work is changed from "August 2, 1926" to "March 6, 1928," is not a statement of a new cause of action. (See Lumsden v. Fox, 301 Ill. App. 488, 492-4; Chamberlin v. Lockwood, 229 Ill. 112, 114; Fraser v. Dunlap, 205 Ill. 144, 148; Lumsden Lumber Co. v. Hulett, 230 Ill. 482, 485.)

Accordingly, the order or decree of the circuit court of December 27, 1932, appealed from, is reversed, and the cause is remanded with directions to the court to overrule the demurrer to the amended intervening petition of the Bellefontaine-Railway Company.

REVERSED AND REMANDED WITH DIRECTIONS.

Matthews, P. J., and Kerner, J., concur.

120 A

36661

SADIE SMITH,
Appellant,

v.

WEST SIDE TRUST & SAVINGS BANK, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 621

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, tried before a jury during December, 1932, there was a verdict in defendant's favor and on January 14, 1933, the judgment appealed from against plaintiff for costs was entered.

In plaintiff's statement of claim, filed May 5, 1932, she alleged that her claim is for the sum of $25,205.61, "upon the written and oral promises made by defendant at the time of the purchase of 25 bonds, numbered 89 to 113, inclusive, aggregating $25,000, of Soker Loan;" that on September 17, 1926, plaintiff purchased the bonds of defendant, and that at that time defendant "undertook and agreed to repurchase the same at any time before their maturity at one-half per cent (1/2%) discount;" that since the purchase and prior to the maturity of the bonds plaintiff tendered the return of the bonds pursuant to the agreement; that defendant failed and refused to repurchase them; and that there is now due and owing from defendant to plaintiff said sum of $25,205.61. And "plaintiff further states that at the time of the purchase of the bonds, defendant, through its duly authorized agent in that behalf, issued a duplicate card to plaintiff, upon which appears, among other items, the following:

[illegible]

[illegible] CORP.,

APPELLANT,

-v-

[illegible] BANK,

APPELLEE.

[illegible] ON APPEAL FROM THE DECISION OF THE COURT.

In an action in assumpsit, tried before a jury during December, 1941, there was a verdict in substance, that on December 14, 1941, the Defendant appealed from against plaintiff for such sum related.

On plaintiff's statement of claim, filed Jan. 6, 1942, the alleged that her claim is for the sum of $[illegible], "upon the prices and real premises made by defendant at the time of the purchase of 10 bonds, described as its 10% debenture, aggregating $10,000, at their issue." That on September 17, 1938, plaintiff purchased the bonds of defendant, and that at that time defendant "assertion and agreed to repurchase the same at any time before their maturity at one-half per cent (1/2%) discount" than above the purchase and prior to the maturity of the bonds plaintiff tendered the return of the bonds pursuant to the agreement that defendant failed and refused to repurchase them; and that there is now due and owing from defendant to plaintiff the sum of $10,000.00. The "plaintiff further states that at the time of the purchase of the bonds, defendant, through its duly authorized agent in that behalf, issued a definitive note to plaintiff, upon which appears, among other items, the following:

Name. Sadie Smith Rep. less 1/2%
Address. 6235 Kenmore Ave. H. J. Beskin.

Loan No.	Note No.	Amount	Due Date	Purchased
1144 Ecker	89 to 113	$25,000	6-4-32	5-17-28."

On May 27, 1932, in compliance with the court's order, plaintiff filed a bill of particulars, verified by her, in which she stated (1) that the bonds were purchased from H. J. Beskin, an officer of defendant; (2) that Beskin undertook and agreed to repurchase the bonds as alleged in plaintiff's statement of claim; and (3) that the tender back of the bonds was made upon Beskin on January 20, 1932.

In defendant's affidavit of merits as amended, sworn to by Beskin, then one of its vice presidents, it denied that it sold the bonds to plaintiff; denied that it issued a "duplicate card" to plaintiff at the time of the sale of the bonds; and denied that Abe Smith, plaintiff's husband, was her duly authorized agent or that defendant ever had any dealings with Abe Smith as her agent.

On the trial plaintiff testified in her own behalf and she called as witnesses her husband, Abe Smith, and said H. J. Beskin. She introduced in evidence the 25 bonds in question and the "duplicate card" mentioned in her statement of claim. The bonds bear date of June 4, 1926, mature on June 4, 1932, bear interest at 6 per cent per annum, payable semi-annually, evidenced by coupons, and the principal and interest are payable at defendant bank. The unpaid coupons due on June 4, 1932, are on the bonds. The card, as introduced in evidence, has written thereon, above the items relative to the bonds in question, other items as to other and different bonds (viz., "Beskin" and "Ginclarnello" bonds) indicating their purchase from defendant on May 12, 1928 (i.e., considerably more than a year after the purchase from defendant of

Name. India Rubber Exp. Date 3/32
Address. Elm Summer Ave. R. J. Smith.

Issue Dt.	Face Vn.	Serial	Par Date	Encumbrance
1944	5% 6s 1/2	2[illegible]	6-4-32	5-17-[illegible]
Right				

On July 27, 1932, in compliance with the court's order, plaintiff filed a bill of particulars, verified by her, in which she stated (1) that the bonds were purchased from R. J. Smith, an officer of defendant; (2) that Smith misrepresented and imposed upon the bonds as alleged in plaintiff's statement of claim; and (3) that the number that of the bonds was made upon Smith on January 30, 1929.

In defendant's affidavit of merits as amended, which is by demurrer, that one of the wire provisions, in denial that it with the bonds in plaintiff's claim is based upon a "negligence suit" to plaintiff at the time of the sale of the notes; and denied that the bonds plaintiff's business, was her only exchange; that the defendant was not negligent; that the bonds in fact accept.

On the trial plaintiff testified in her own behalf and she called as witnesses her husband, the clerk, and said R. J. Smith. The introduce in evidence the 28 bonds in question and the "negligence suit" mentioned in her statement of claim. The bonds bear date of June 1, 1924, matured on July 1, 1932, bear interest at 6 per cent per annum, payable semi-annually, authorized by counsel, and the principal and interest are payable at defendant bank. The bonds complete due on June 1, 1932, but on the coupon-less such, an instrument in evidence. Bei written Convert Stock the item relative to the bonds in question, which items on it other and different bonds (wit, "Bonds" and "Coupon-coupon" bonds) indicating that purchase from defendant on May 11, 1932 (later) considerably more than a year after the purchase from defendant of

the bonds in question on September 17, 1926.) In the upper right hand corner of the card is the following writing "Rep. less 1/2%. H. J. Beskin," and in the lower right hand corner and written across the face of the card and below all of the items, are the words: "Duplicate card."

Beskin, called as plaintiff's witness, testified in substance that he had known Abe Smith as a depositor in defendant bank for about 16 years; that in September, 1926, he (Beskin) was manager of the bond department of the bank, and during 1928, he become one of its vice-presidents; that while acting in the latter capacity in 1928, and at the request of a woman employee of the bank, in whom he had confidence, he wrote the words on the card "Duplicate card," and the words, "Rep. less 1.2%. H. J. Beskin," and gave the card back to said employee; that he did not at that time compare said duplicate card with the original card in the files of the bank; that the next time he saw the duplicate card was when plaintiff came into the bank "some time last year," and showed it to him; and that he no longer is an official of the bank, - having severed his connection with it on October 1, 1932.

Abe Smith, on the theory that in September, 1926, and thereafter, he was acting as the agent of his wife, was allowed by the court to give certain testimony, the substance of which is that he had been a depositor in defendant bank since 1908, and had known Beskin as an official thereof for over 16 years; that during September, 1926, he had a conversation with Beskin about the purchase from defendant of the bonds in question for his wife; that Beskin said that "if I would purchase the bonds he would repurchase them at any time before they matured at one-half of one per cent," and that "I said that if my wife gives me permission to buy them I will buy," and that I would let him know; that a few days later, after consulting his wife, he bought the bonds "on that basis" and

the bonds in question on September 17, 1928,) in the upper right hand corner of the card is the following writing "Geo. Lee L/C. Br. L. Deskin," and in the lower right hand corner and written across the face of the card and below all of the items, are the words "Highlands Co.".

Deskin, called as plaintiff's witness, testified in substance that he had known Lee with as a depositor in defendant bank for about 12 years; that in September, 1928, he (Deskin) was manager of the bank department of the bank, and Charles Lee, he became one of its vice-presidents; that while acting in the latter capacity in 1928, and at the request of a woman employee of the bank, in whom he had confidence, he wrote the words on the card "Highlands Co." and the words, "Geo. Lee L/C. Br. L. Deskin," and gave the card back to said employee; that he did not at that time compare said signature card with the original card in the file of the bank; that the card came to his desk in the ordinary course of the bank's business; that he was "some time last year," and showed it to Kipp; and that he no longer is an official of the bank - having severed his connection with it on October 1, 1928.

The claim, or the theory that is Defendant's, that, as observed, he was acting as the agent of his wife, was filtered by the court to give certain testimony, the substance of which is that he had been a depositor in defendant bank since 1903, and had been treated as an official thereof for over 12 years; that during September, 1928, he had a conversation with Deskin about the purchase from defendant of the bonds in question for his wife; that Deskin said that "if I would purchase the bonds he would repurchase them at any time before they matured at one-half of one per cent," and that "I said that if my wife gave me permission to do that I will buy," and that I would let him know; that a few days later, after consulting his wife, he bought the bonds "on that basis" and

immediately delivered them to her; and that he received the "duplicate card" from Beskin "some time in 1928." Plaintiff testified on direct examination in substance:

That her husband, Abe Smith, purchased the 25 bonds in question for her "maybe three or four years ago (i.e., 1928 or 1929), I do not remember exactly;" that "before I received these bonds I had a conversation with him and I gave him money with which to purchase them;" that "we had a joint account" at the bank; that "I do not remember the amount in it, but I think it was in excess of $25,000;" that "my husband delivered the bonds to me a couple of days after the conversation, and they have been in my possession ever since;" that on January 20, 1932, "in company with my son and his friend" (not called as witnesses for her) she called on Beskin at the bank; that she showed the bonds and the "duplicate card" to him, tendered the bonds to him and demanded that he "cash these bonds for me at one-half per cent as he promised;" that Beskin refused to cash the bonds; and that "I took the bonds home with me."

During her cross-examination plaintiff testified in part as follows:

"I was married to Mr. Smith in 1912, prior to which time I worked as a stenographer. * * He was a contractor and builder. * * I know what a joint account is. I had money and gave it to him to put in the bank with his in a savings account. I did not have the power to withdraw. Nothing in writing indicated that any of the money was mine. The money that I gave to my husband, I got from him in weekly amounts that I saved. These bonds were given to me some time in September, 1926, and I put them in my safety box at the Broadway National Bank. * * When the interest on the bonds become due I went down and collected it. Sometimes I gave the coupons to Mr. Smith to collect. * * He would deposit in his account and give me a check and I would deposit it in my own savings account at the Broadway Bank. * * I purchased some other bonds through my husband the same way. * * The first time I went to defendant bank with reference to the bonds sued upon was in 1932. * * When my husband made money he would sometimes give me large sums, like $5,000. When I got my weekly allowances, I would save up. After I would save up a few thousand, I would give it to him."

For defendant bank Beskin and six other witnesses testified. Defendant also introduced numerous writings, consisting of interest checks on the bonds in question, deposit slips, ledger sheets, signature cards and other bank records. Among these writings was the original card, from which the "duplicate card," mentioned in plaintiff's statement of claim, was made out. This original card does not have thereon the writing "Rep. less 1/24. H. J. Beskin," but it has similar

writings as to the 25 bonds in question as having been purchased on September 17, 1926, and also as to said "Beskin" and "Cinclarnello" bonds as having been purchased in May, 1928. Apparently the card originally was made out in the name of "Abe H. Smith," for the "Abe H." is crossed out and the name "Sadie" is written immediately above the erasure. And across the face of the card is the writing "Old file; new card made." Irene Chappell, one of defendant's employees, testified that the original card was "made out by myself on September 17, 1926, from information on tickets issued from the cage;" that the name originally on the card was Abe H. Smith; and that the change to Sadie Smith was made by Pearl Fortunato early in 1930." Pearl Fortunato, another employee of the bank, testified: "I wrote the name Sadie Smith on the card in the early part of 1930. I received a notation to change the name, but from whom I cannot say. There was some memoranda that someone else gave me in the department. I know Mr. Abe Smith. I made out a couple of interest checks for him. * * I never met Sadie Smith. She never presented any bonds or coupons to me. * * My signature is on the margin of Defendant's Exhibit 9." This exhibit, contained in the present record, is a check of defendant bank for $750 for interest due on the bonds in question on June 4, 1930, is dated June 4, 1930, is payable to Abe Smith, bears his indorsement, and is stamped paid. Other defendant's exhibits are similar checks for interest maturing on the bonds in question, issued prior to June, 1930, and they are made payable to Abe Smith, are indorsed by him and were paid. Other defendant's exhibits, and testimony of witnesses for it, disclose that it was not until some time in the year 1930 that the bank had notice that the ownership of the bonds in question had been transferred by Abe Smith to plaintiff, his wife. Certain checks

for $750 each for interest maturing on the bonds on December 4, 1930, and thereafter, were made payable to plaintiff, were indorsed by her and were paid.

Mary Tansey (not employed by defendant at the time of the trial) testified in substance that she worked in various capacities for defendant bank from 1923 to January, 1928; that she recalls that Abe Smith purchased the 25 bonds in question in September, 1926; that at that time she was a stenographer for Mr. Monahan of the loan department of the bank; that the transaction was between Monahan, representing the bank, and Abe Smith; that she was sitting just across the desk at the time and made out the usual "tickets;" that one of these tickets, in her handwriting, was a memorandum as to the amount of the accrued interest on the bonds, $429.19 (introduced in evidence as Deft's Ex. 3); that Smith at the time gave two checks, payable to the bank, one for $25,000, the par value of the bonds, and the other for said accrued interest; that Smith handed the checks to Monahan and he handed them to her (the witness); that Mrs. Smith was not present; that nothing was said as to Smith making the purchase of the bonds for anyone other than himself; and that Mr. Beskin was not present at the time of the transaction, and was not then "in our department."

Beskin testified for defendant on direct examination: "I did not make a sale on September 17, 1926, of $25,000 worth of the Acker bonds to Abe Smith or to Mrs. Smith. I never sold any bonds to Mrs. Sadie Smith." On cross-examination he testified in part:

"I have never before today seen these identical bonds (i.e., the 25 Acker bonds sued upon, Nos. 89 to 113.) I have seen other similar bonds in the bank but not any bearing these numbers. I am positive I did not deliver these particular bonds to Abe Smith in September, 1926. I sold some 'Beskin' and 'Ginclarnello' bonds in 1928. * * I made the notation on the duplicate card 'Rep. less 1/2%.' A young lady in charge of the

Our 1939 entry for interest returned on the bonds on December 6, 1940, and incidentally, were made payable to "Anonymous", were lettered by hand and were gold.

Only Thorpe had engaged by deferment as the time of the trial; statistics in publication that you needed in wartime; negotiable for deferment both from 1939 to January, 1941; that we had produced one US bonds in quantities in September, 1941; that at time you was a schoolmaster for my, Bonding of the Jews department of the bonds; that the investments was between Bonds, arrangements the bank, and the liability that the was retaking just survey the desk of the time and bonds and the bonds "Liberty" that one of three bonds, in our manufacturing, was a memorandum on the money of the payment received on the bonds. Said-Ex (letters) in reference on bonds's Ex. 1; that bonds at the time were the checks, provide to the bonds, are for 1939, the per value of the bonds, and the price for said received interest; that both bonded the checks to Hamden and to bonded time to Ber (the witness); that Mr. Smith was not previously that negotiating was said on to Smith another the payment of the bonds for payment other time already; and that Mr. Smith was not present at the time of the investment, and was not then "in our department."

Smith testified for defendant on direct examination:

"I did not make a note on September 17, 1940, of $18,000 worth of the Joint Bonds to the Smith on in Ter. Smith. I never held any bonds in Ter. Smith Smith." On cross-examination he testified in part:

"I have never before today seen these identical bonds (i.e., the 18 Joint Bonds and coupon, Def. 20 to 111). I have seen other similar bonds in the vault but not any bearing these numbers. I am positive I did not deliver these particular bonds to the bank in September, 1940. I said some 'Smith' and 'Smithsonian' bonds in 1940. I made the notations on the duplicate card 'Top. Ser 1/20'. A young lady in charge of the

office asked me to do so on account of some notation made in the records previously. Her name is Irene Chappell. I didn't myself examine the records. * * I never talked with Abe Smith about these particular bonds. They were never sold by me. * * When I wrote the notation on the duplicate card, I am quite sure that these two other notations 'Beskin' and 'Sinclarnello' were on the card. The young lady in my office called my attention to the fact that there was a certain notation on the record, and she asked me to put the same notation on the card. That is my explanation for the notation on the corner. I never talked to Abe Smith about it. Mr. Smith did not tell me he was buying these bonds (Ecker) for Sadie Smith. * * I know about the Beskin and Sinclarnello bonds. I sold these bonds myself to Abe Smith. The notation on the duplicate card, 'Rep. less 1/2%,' refers to them. I sold the Beskin and Sinclarnello bonds on the representation that we would repurchase on one half of 1 per cent, if we could create a market for them. * * They were sold on May 12, 1928, in a transaction with Abe Smith."

The main contention of plaintiff's counsel is in substance that the verdict is against the weight of the evidence on the questions whether in September, 1926, Abe Smith, as plaintiff's agent, purchased of defendant the 25 Ecker bonds for plaintiff, and whether at the time of said purchase, and in consideration thereof, defendant agreed to repurchase them at any time before their maturity at one-half per cent (1/2%) discount. After a careful examination of all the evidence we are of the opinion that the contention is without merit. Considering the issues as made by the pleadings, the documentary evidence and the conflicting oral testimony, we think that the jury's verdict is sustained on the theories that Abe Smith purchased the 25 Ecker bonds for himself and not as agent for plaintiff, his wife, and that at the time of said purchase defendant did not agree to repurchase them at any time before their maturity at one-half per cent discount or at any discount. While it appears from the testimony of Beskin that the "Beskin" and "Sinclarnello" bonds were purchased in May, 1928, by Abe Smith for himself, and under an agreement with defendant, through Beskin, that it would repurchase them upon request upon the conditions stated in defendant's records, it does not appear, in our opinion, that defendant made a similar agreement with Abe

Smith at the time of his purchase of the Ecker bonds in question in September, 1926.

It is also contended by plaintiff's counsel that certain instructions contained in the court's oral charge to the jury were erroneous and prejudicial to plaintiff. A sufficient answer to this contention is that the present record does not disclose that any objections were made to the charge, or any portions thereof, before the jury retired to consider their verdict. (See Rule 3 of the rules of the Municipal Court of Chicago; Pecarare v. Malberg, 246 Ill. 95, 97; Gamble-Robinson Co. v. Oregon, etc. R. Co., 174 Ill. App. 375, 381.) We have, however, read the court's lengthy charge in its entirety as contained in the record, although only portions of the charge are set forth in plaintiff's abstract of the record (see Roodhouse v. Christian, 158 Ill. 137, 141), and are of the opinion that the jury were fully and fairly instructed and that there are no errors therein which can be considered as prejudicial to plaintiff or requiring a reversal of the judgment.

The judgment of the municipal court of January 14, 1933, appealed from, should be and is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

[illegible] of the time of his [illegible] of the [illegible] trials in [illegible] in [illegible], 1908.

It is also contended by plaintiff's counsel that certain [illegible] in the [illegible] should [illegible] in the jury was [illegible] and prejudicial to plaintiff. [illegible] however in this [illegible] in that the present record does not disclose that any [illegible] were made in the charge, or our particular [illegible], before the jury retired to consider their verdict. [illegible] of the [illegible] of the [illegible] Court of Chicago Terminal v. Hilliard, 148 Ill. App. 77; Chicago-Terminal [illegible] v. Terrell, [illegible] Ill. App. 377, 380.) In [illegible] however, that the [illegible] charge [illegible] in the [illegible] in the [illegible], although only [illegible] of the charge are not [illegible] to plaintiff's [illegible] of law [illegible] v. [illegible], 198 Ill. App. 341, and one of the [illegible] also the jury were fully and fairly instructed [illegible] there are no [illegible] theories which can be [illegible] in [illegible] to [illegible] a [illegible] of the judgment.

The judgment of the municipal court of Chicago [illegible], 1910, appealed here, should be and is affirmed.

AFFIRMED.

[illegible] P. J., and [illegible] J., concur.

38713

/21/ H

CLARA L. SCHIRSING,
Appellant,

v.

WALTER F. E. SWANSON et al.,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

272 I.A. 622

MR. JUSTICE SHIRLEY DELIVERED THE OPINION OF THE COURT.

On February 15, 1930, complainant filed her bill to foreclose a first trust deed, dated April 6, 1929, recorded April 10, 1929, and given by Walter F. E. Swanson and wife to secure part of the purchase price of certain premises located in the Village of Palatine, Cook County, Illinois, purchased from complainant. Among the parties defendant to the bill were five mechanics' lien claimants, who in their respective answers and intervening petitions or cross bills claimed that their several liens were prior and superior to the lien of the trust deed or mortgage. After issues joined the cause was referred to a master in chancery, before whom much oral and documentary evidence was introduced. In his report, filed December 5, 1932, he made findings to the effect that the five lien claimants were severally entitled to mechanics' liens "of equal validity and priority" upon the premises and for the respective amounts found due to them, and that the complainant by virtue of the trust deed or mortgage had a valid <u>second</u> lien upon the premises in the amount found due to her, "subject only to the mechanics' liens as above found." In the foreclosure decree, entered January 3, 1933, the court overruled complainant's exceptions to the master's report, approved and confirmed the report and made findings in substantial accord with those of the master as to the priorities of liens. And the court

[illegible]

[illegible]

[illegible]

adjudged that if within three days the several amounts found due to the various parties were not paid, the master should sell the premises at public auction, etc.; that after paying costs, expenses of the sale, master's fees, etc., he should first pay out of the net proceeds the said amounts found due to the five lien claimants respectively, together with legal interest from date of the decree; that if the net proceeds were insufficient to pay in full the amounts due to them, payments pro rata should be made; that after paying them in full, if there be a remainder of the net proceeds, the master should next pay to the complainant the amount as above found to be due to her, etc. From the decree complainant perfected the present appeal.

During February, 1929, complainant was the owner of the premises involved, and she and her husband, Dr. William P. Schirding, were and for a long time had been occupying a residence building thereon as a homestead. On February 28, 1929, they entered into a written contract with Swanson and wife for the sale to the Swansons of the premises for $50,000, - $15,000 of which was to be paid in cash, and $20,000 by a note for that amount by one Koehling, and the balance by a conveyance by the Swansons of another improved residence property in the vicinity, free of incumbrances, known as the Richmond Subdivision property. In the negotiations leading up to the execution of the contract Swanson informed the Schirdings that after acquiring the premises the Swansons expected to wreck the residence building thereon and improve the property with a new building, wherein there would be space for a bank, stores, offices, etc. And sketches of the proposed building were shown to the Schirdings and they were further informed that it was to be "like the one in Arlington Heights." The deal was consummated on April 6, 1929, but not exactly as agreed, owing to the inability of the Swansons to raise all of the $15,000 cash payment, or to pay off

an encumbrance of $5,000 and certain mechanics' lien claims on the Richmond subdivision property. The Schirdings deeded the premises involved to the Swansons, who simultaneously executed and delivered to complainant their note for $29,000, payable October 6, 1929, with interest as evidenced by one interest coupon note also payable on October 6, 1929, and as security for these notes the Swansons also simultaneously executed and delivered their purchase money trust deed, running to the Chicago Title & Trust Co., as trustee. And the Swansons executed and delivered to complainant their deed to the Richmond Subdivision property, but with said encumbrance thereon and said lien claims remaining unsatisfied. After the date of the contract, February 28, 1929, and before April 6, 1929 (the date the purchase money mortgage herein sought to be foreclosed was executed), Walter F. K. Swanson made oral contracts severally with the five mechanics' lien claimants, whereby they were to perform certain labor or furnish certain materials in the erection of the proposed new building. One was a firm of architects which was to furnish preliminary sketches, general drawings, specifications, etc., for the proposed building; another was a firm engaged in the excavating business, which agreed to do certain work; and the other three were contractors engaged respectively in the furnishing of lumber, sand, gravel, etc., and cement, lime, etc., who severally agreed to do certain work or furnish certain materials. About March 25, 1929, the firm that had agreed to do the excavating work moved a machine upon that part of the premises, not occupied by the residence building in which the Schirdings still were living, and commenced making excavations. Shortly thereafter complainant made a protest to Swanson against the continuance of the particular work and solely because he had delayed in the closing of the contract. Upon his promises that the contract would soon be closed

complainant allowed further excavation work to be done, but on April 6th (the contract still not having been closed) she peremptorily ordered that such work be stopped. As a result of her action, which apparently was taken for the purpose of bringing about the consummation of the deal, the parties got together on the evening of April 6th and the contract finally was consummated as above stated. Thereafter Swanson caused further excavating work to be done, and on April 12, 1929, the Schirdings moved out of the premises and took up their residence in the building on the Richmond Subdivision property, which was only about four blocks distant from the premises involved. Thereafter the old residence building on the premises involved was torn down, further excavations made, and the footings and basement wall for the new building were installed and partially completed, but some time in June, 1929, further work ceased and the project of erecting a completed building as planned was abandoned. When the purchase money mortgage notes held by complainant became due they were not paid by the Swansons, or by anyone for them, and on February 15, 1930, complainant filed her present bill to foreclose the trust deed securing said notes. In the meantime, during the summer or fall of 1929, and within apt time, the five lien claimants, who had performed work on or furnished materials to the building under their respective contracts made with Swanson, filed lien claims in the office of the clerk of the circuit court. The master in his report made findings as to the details of each claimant's claim, and further that Swanson was "knowingly permitted" by complainant to enter into each of the five oral contracts with said claimants. Similar findings on this particular issue were made by the court in the decree appealed from.

In section 1 of the Mechanics' Lien Act of 1903, as amended (Cahill's Stat. 1929, Chap. 82, p. 1658) it is in part

provided (italics ours):

"That any person who shall by any contract or contracts, express or implied, * * with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of or to improve the same, furnish material, fixtures, apparatus or machinery, forms or form work, * * for the purpose of or in the building, altering, repairing or ornamenting any house or other building, * * on such lot or tract of land or connected therewith, * *; or perform services as an architect * * for any such purpose; or furnish or perform labor or services as superintendent, timekeeper, mechanic, laborer or otherwise, in the building, altering, repairing or ornamenting of the same; * * shall be known under this Act as a contractor, and shall have a lien upon the whole of such lot or tract of land and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business, * * for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date thereof is due. This lien shall extend to an estate in fee, for life, for years, or any other estate or any right of redemption, or other interest which such owner may have in the lot or tract of land at the time of making such contract or may subsequently acquire therein, * *; and this lien shall attach as of the date of the contract."

One of the contentions, urged by complainant's counsel for a reversal of the decree, is that the evidence does not sufficiently show that complainant, as the owner of the tract of land involved, "knowingly permitted" Swanson to contract with each of the five lien claimants for the improvement of such tract of land. After reviewing all the evidence bearing upon the question we are of the opinion that the contention is without merit.

Equally without merit, in our opinion, is complainant's counsel's further contention that "where a purchaser of land under a contract makes improvements, and subsequently receives a deed and at the same time executes and delivers a purchase money mortgage to the vendor, such mortgage takes priority over the mechanics' liens incurred in the construction of the improvement." Counsel for the lien claimants makes the contrary contention that "an unpaid vendor, who authorizes or knowingly permits the vendee to contract for improvements subjects his interest in the property for the unpaid purchase price to the prior liens of the mechanics' lien claimants," which attach as of the date of their respective

contracts. And, in view of the evidence, we are of the opinion that this contrary contention of counsel for the lien claimants is amply sustained by the above quoted statute and numerous decisions of the courts of review of this State. (See Henderson v. Connelly, 123 Ill. 93, 103; Paulsen v. Manske, 126 Ill. 72, 78; Rice v. Gould, 73 Ill. App. 538, 541; Hertz v. Bulley, 144 Ill. App. 329, 333-4; Granite City Lime Co. v. Fitzmann, 161 Ill. App. 228, 231-2; Cooper v. Palais Royal Theatre Co., 242 Ill. App. 184, 194-5.) Complainant's counsel's contention, that the purchase money mortgage given to the vendor (complainant) takes priority even over the prior mechanics' liens of the five claimants, is seemingly based upon the theory of a vendor's equitable lien, but such a theory cannot here be applied because it is the law that where a vendor takes security other than the personal liability of the purchaser for the payment of the purchase price, the vendor's equitable lien is waived or discharged. (Lehndorf v. Cope, 122 Ill. 317, 332; Baker v. Updike, 155 id. 54, 58; Blomstrom v. Rux, 175 id. 435, 441.)

As another ground for the reversal of the decree complainant's counsel contends that inasmuch as no completed building was erected upon the property, and the contemplated improvement was abandoned shortly after it was started, leaving the property in a "mutilated" condition with partly finished excavations and basement walls, it is inequitable to allow priority to the mechanics' liens of the five claimants over the lien of complainant's purchase money mortgage. In view of the provisions of sections 1 and 4 of the Mechanics' Lien Act we cannot agree with counsel's contention. (See Fehr Construction Co. v. Postl System, 288 Ill. 634, 643; Crowen v. Meyer, 342 id. 46, 52.)

Our conclusion is that the decree of the circuit court of January 3, 1933, appealed from, should be affirmed, and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

[illegible]. And, in view of the evidence, we are of the opinion that this attorney appearance of counsel for the lien claimants is amply warranted by the above cited statutes and decisions [illegible] of the courts of review of this state. (See Hungerford v. Cunningham, 320 Ill. 99, 102; Dodson v. Bowden, 132 Ill. 32, 38; Ziegler v. Smith, 77 Ill. App. 458, 462; Jerth v. Bailey, 164 Ill. App. 488, 490-91; Bunnie Jane Inc. v. Clemons, 347 Ill. App. 238, 242-43; Gamer v. Saint Louis Theater Co., 241 Ill. App. 234, 240-41.) Complainant's counsel's contention, that the pertinent money authority given to the owner (complainant) terms primarily upon the "prior mortgage" liens of the two defendants, is materially based upon the theory of a vendor's equitable lien, but such a theory cannot here be applied because it is the law that where a vendor takes security other than the personal liability of the purchaser for the payment of the purchase price, the vendor's equitable lien is waived or discharged. (Lombard v. Cary, 240 Ill. 187, 192; Cahn v. Whitney, 181 Ill. 84, 88; Stevenson v. Jones, 178 Ill. 400, 411.)

As another ground for the reversal of the decree complainant's counsel contends that inasmuch as a completed building was erected upon the property, and the architect-contractor's lien was asserted shortly after it was started, leaving the property in a "unfinished" condition with partly finished construction and basement walls, it is inequitable to allow priority to the mechanics' liens of the five defendants over the lien of complainant's purchase money mortgage. In view of the provisions of sections 2 and 4 of the Mechanics' Lien Act we cannot agree with counsel's contention. (See Pyle Construction Co. v. Pepsi Cola, 386 Ill. 491, 494; Lyman v. Dwyer, 343 Ill. 46, 52.)

The contention is that the course of the strenuous course of January 7, 1949, appellee firm should be affirmed, and it is so ordered.

Affirmed.

Gulliver, P. J. and Hershey, J., concur.

122 A

36087

CONSUMERS PETROLEUM COMPANY,
a corporation,
Appellant,

v.

YELLOW CAB COMPANY, a corporation,
and BENZOLINE MOTOR FUEL COMPANY,
a corporation,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

272 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued Yellow Cab Company, a corporation, and Benzoline Motor Fuel Company, a corporation. The case was tried by the court and at the close of plaintiff's evidence there was a finding for defendant Yellow Cab Company; and at the close of all the evidence there was a finding for defendant Benzoline Motor Fuel Company. Judgment was entered upon the findings and plaintiff has appealed. Plaintiff makes no point as to the finding of the court in favor of Yellow Cab Company, a corporation.

Plaintiff's statement of claim alleges that on July 21, 1927, the defendant Yellow Cab Company and plaintiff entered into a written contract of leasing of approximately 340,000 gallons of tank storage space in plaintiff's plant for a period of three months commencing July 22, 1927, for the sum of $2,000 payable in three equal monthly installments of $666.67, and that in the event the Yellow Cab Company should hold over after October 21, 1927, or after the 21st day of any subsequent month, for a month or any fraction thereof, by occupying the said space or any portion thereof, the leasing shall be held to be renewed for another month, at the same rental; that plaintiff agreed to load or unload the commodity to be stored in the tank storage space allotted to defendant at a

[illegible]

[illegible]

[illegible]

charge of $5 per carload; that after October 21, 1927, defendants Yellow Cab Company and Benzoline Motor Fuel Company were in possession of the said space at an agreed rental of $450 per month; that the defendants remained in possession until on or about May 5, 1928, and failed to pay the monthly rental due January 21, 1928, February 21, 1928, March 21, 1928, and April 21, 1928.

The affidavit of merits of Benzoline Motor Fuel Company admits that about October 21, 1927, it went into possession of the said storage space; that it had theretofore agreed to pay plaintiff the sum of $450 for the use of said space for a period of one month from October 21, 1927, to November 20, 1927; that on or about November 15, 1927, plaintiff represented to defendant that the said storage space was fully equipped with serviceable steam coils, which were so arranged that heat could be applied to the tank; that plaintiff knew and was informed that the benzol which was stored in the tank froze and solidified at a high temperature, and that it then and there agreed to lease the tank to said defendant and to furnish heat for the tank for a period of one month beginning on November 21, 1927, for the sum of $450; that the defendant agreed to pay for any coal that was used by plaintiff in and about heating the tank provided that lower temperatures prevailed and the benzol became frozen or solidified; that on or about December 9, 1927, defendant discovered that the benzol then stored in the tank was frozen and solidified so that it could not be drawn from it; that it requested plaintiff to furnish steam, but plaintiff neglected and refused to furnish steam or apply heat to the tank and it was therefore impossible to remove the product from the tank except in small quantities; that because of plaintiff's failure to furnish heat or steam for the coils in the tank it was impossible for defendant to remove all the benzol from the tank during the period from November 21, 1927, to and including January 21, 1928; and that defendant was unable to remove all the

charge of 10 per cent since after October 31, 1947, defendants Yellow Cab Company and Beneficial Finance Corporation were in possession of the cab upon or on account period of 1420 per month; that the testimony concerning in possession until on or about July 6, 1948, and failed to pay the monthly rental due January 31, 1948, February 29, 1948, March 31, 1948, and April 30, 1948.

The evidence of witnesses of Beneficial Finance Corporation shows that about October 29, 1947, in your late possession of the cab exactly about that it had discontinued efforts to pay installment the sum of $180 for the use of cab since for a period of one month from October 31, 1947, in November 30, 1947; then on or about December 29, 1947, Beneficial informed in substance that the cab had been repossessed in the hands there and satisfied at a high temperature, and that it then and there agreed to issue the same to said defendant and to furnish back for the period of one month beginning on November 30, 1947, for the sum of $180; that the defendants agreed to pay the same and that was used by plaintiff in and about meeting the back payments that have temporarily prevailed and the amount taken from or satisfied that on or about December 6, 1947, defendants discovered that the amount taken in the back was figures and satisfied as that it could not be been from its repossessed plaintiff in Dorado stated, plaintiff complained the related to Florida stated or early June to the back and it was therefore impossible to remove the back to the back and the plaintiff's failure to furnish back or return for the cab in the back it was impossible for defendant to remove all the money from the back during the period from December 30, 1947, to and including January 29, 1948; and that defendant was unable to remove all the

benzol until early in the month of May, 1928, when said benzol became liquified by the atmospheric heat; that defendant paid $450 for the period from October 21, 1927, to November 21, 1927, and the same amount for the period from November 21, 1927, to December 21, 1927; that prior to the expiration of the said last period plaintiff represented that steam would be applied to the tank and the defendant then and there agreed to remain in possession for the period from December 21, 1927, to January 21, 1928; that despite the fact that defendant paid the sum of $450 for rent for said period the plaintiff refused and neglected to furnish heat or steam and as a result thereof the defendant was unable to remove its product from the tank at the end of said period, and that the defendant is not indebted to the plaintiff in the sum of $5,000 or any sum whatsoever. Later defendant Benzoline Motor Fuel Company, by leave of court, filed an additional affidavit of merits alleging that the contract was one for the storage of benzol, a highly inflammable, dangerous and explosive product, within the area prohibited for such storage by the ordinance of the City of Chicago and that by reason thereof the contract was illegal and void and that plaintiff ought not to be permitted to reap the benefit thereof. The defendant does not appear to rely upon the alleged defense stated in the additional affidavit of merits, and it is therefore unnecessary for us to consider plaintiff's contention and argument in reference thereto.

The principal points relied upon by plaintiff for a reversal are (a) "The evidence fails to establish the defense that the product of the Benzoline Motor Fuel Co. was frozen and could therefore not be removed before May 9, 1928;" (b) "The defense based on the alleged breach of warranty to furnish heat, was waived;" and (c) "The finding and judgment of the Court is clearly

and manifestly against the weight of the evidence." The defendant states that "the defense in this case consists in the warranty that the tank was equipped with steam coils; that the plaintiff would furnish heat, at the cost of the fuel; that the plaintiff breached its agreement, failed to furnish heat and as a result the benzol became frozen, and that the defendant was unable to remove its benzol by reason of its frozen condition, resulting from the plaintiff's failure to abide by its previous agreement and warranty." The defendant denies that it waived the breach of warranty to furnish heat.

Every material question of fact in the case was controverted. It was the province of the trial court to pass upon the credibility of the witnesses and to determine the weight that should be attached to their testimony and to find the facts in the case. The court, after hearing the witnesses testify and after examining the documentary evidence introduced, found the issues for the defendant, and after a careful consideration of all the facts and circumstances in the case, we are satisfied that his findings should not be disturbed. There is no merit in the contention of the plaintiff that the defendant waived the alleged breach of warranty to furnish heat by paying rent for the period from December 21, 1927, to January 21, 1928, amounting to $450. (See Selz v. Stafford, 284 Ill. 610.)

No complaint is made that the court erred in the admission or rejection of evidence. The case seems to have been fairly tried and the judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

and qualitatively assisted the valets at the wheelhouse." The defendants admits that "the defense is able even sufficiently to the warranty that the tank was equipped with steam coils; that the plaintiff would furnish heat, at the case of the truck; that the plaintiff breached its agreement, failed to furnish heat and as a result the tankers became frozen, and that the defendant was unable to remove its goods by reason of its frozen condition, resulting from the plaintiff's failure to abide by its previous agreement and warranty." The defendant claims that it waived the breach of warranty by furnish heat.

Every material question of fact in the case was contested. It was the province of the trial court to pass upon the credibility of the witnesses and to determine the weight that should be attached to their testimony and to find the facts in the case. The court, after hearing the witnesses testify and after examining the documentary evidence introduced, found the issues for the defendant, and after a careful consideration of all the facts and circumstances in the case, we are satisfied that his findings should not be disturbed. There is no merit in the contention of the plaintiff that the defendant waived the alleged breach of warranty to furnish heat by paying rent for the period from December 21, 1937, to January 21, 1938, amounting to $180. See Pyle v. Shelton, 288 Ill. 624.

We conclude to make that the court erred in the admission or rejection of evidence. The court seems to have fairly tried and the judgment of the municipal court of Cicero will be affirmed.

AFFIRMED.

Matthews, P. J., and Tybitzky, J., concur.

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WILLIAM T. WOODLEY,
Defendant in Error,

v.

ALEXANDER WEIR et al.,
Defendants.

AGNES WEIR et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

272 I.A. 622[3]

MR. JUSTICE SHAWLAN DELIVERED THE OPINION OF THE COURT.

William T. Woodley filed his amended bill for foreclosure of certain real estate and made Chicago Title and Trust Company, as trustee, Mary Powell, Edwin M. Powell, Margaret Walters, William A. Walters, Agnes Weir, James Weir, Jeanette Weir, Agnes Weir, as administratrix of the estate of Alexander Weir, deceased, and Nathaniel Rubinkam parties defendant. The cause was referred to a master, who filed a report recommending that a decree of foreclosure be entered, and a decree, in strict conformance with the findings and recommendations of the master, was entered. Agnes Weir, individually and as administratrix of the estate of Alexander Weir, deceased, Janet Weir (sued as Jeanette Weir) and James Weir, defendants, have sued out this writ of error and they have been granted leave to prosecute this writ alone.

The amended bill alleges that Alexander Weir, a bachelor, executed and delivered his principal note of $18,000 and ten interest notes of $450 each, all dated November 3, 1927, secured by his trust deed to the Chicago Title and Trust Company, as trustee, on certain real estate situated in Cook county, Illinois; that said Alexander Weir died intestate on March 15, 1929, and left as his only heirs

at law and next of kin Mary Powell, Margaret Walters, Agnes Weir, Jeanette (Janet) Weir and James Weir; that default was made in the payment of interest coupons numbers 3, 4 and 5 and that thereupon the complainant declared the principal note and interest thereon due and payable as provided in the trust deed. The bill prays for an accounting and sale of the premises, etc.

The answer of Agnes Weir, Janet Weir and James Weir to the amended bill states that they are not advised of the execution and delivery of the alleged principal promissory note of $15,000, the ten interest notes and trust deed, and they deny the making, execution and delivery of the same and ask for strict proof thereof. The answer avers that on November 15, 1927, Alexander Weir, the alleged maker of the alleged notes and trust deed, was not indebted in the sum of $15,000, as alleged in the bill, and that if the said notes were signed and delivered by him they were without consideration; that if they were executed and delivered by him they were executed for the purpose of effecting a settlement of a claim that had been made against said Weir by one Charles Doering, and that they were delivered to one George H. Young to carry out said purpose; that long after the date of the said alleged notes, they were hypothecated by said Young, without the knowledge or consent of said Alexander Weir, with the First National Bank of Blue Island, to secure a note of $2,500 made by said Young; that thereafter William K. Young, a brother and partner of George H. Young, obtained the alleged notes and trust deed and hypothecated them with complainant, but that the said hypothecation was made without the knowledge or consent of Alexander Weir and that after the death of the latter his heirs were unable to learn who held the said notes, and that they were hypothecated by William K. Young, or on his behalf, wrongfully as against the said defendants. The answer denies that coupons numbers 1 and 2 were paid by Alexander Weir and delivered to him, and aver

as law and work of his many years, Margaret Kilgore, Lynne Kelly, Jacqueline (Jackie) Yale and James Craig that defaults was made in the payment of interest coupons numbers 3, 4 and 5 and that thereupon the complainant declared the principal note and interest thereon due and payable in advance in the trust deed, the bill prays the appointing and sale of the premises, etc.

The answer of Agnes Weir, Janet Weir and James Weir to the amended bill states that they are not advised of the execution and delivery of the alleged principal promissory note of $15,000, the two interest notes and trust deed, and they deny the execution and delivery at the same and each for strict proof thereof. The answer states that on November 12, 1927, Alexander Weir, the alleged maker of the alleged note and trust deed, was adjudged in the sum of $15,000, as alleged in the bill, and that if the said notes were signed and delivered by him they were without consideration; that if they were executed and delivered by him they were executed for the purpose of effecting a settlement of a claim that had been made against said Weir by one Charles Jacobs, and that they were delivered to one George E. Young to secure and held pursuant that law after the date of the said alleged notes, they were hypothecated by said Young, without the knowledge or consent of said Alexander Weir, with the First National Bank of Blue Island, to secure a note of $15,000 made by said Young that otherwise William H. Young, a brother and partner of George E. Young, obtained the alleged notes and trust deed and hypothecated them with complainant, but that the said hypothecation was made without the knowledge or consent of Alexander Weir and that after the death of the Easter Sis Sales were unable to learn who held the said notes, and that they were hypothecated by William H. Young, or on his behalf, wrongfully as against the said defendants. The answer denies that coupons numbers 3 and 4 were paid by Alexander Weir and delivered to him, and avr

that Alexander Weir never recognized, at any time, any liability on said notes and trust deed; that he never paid any interest on the alleged $15,000 note and that he denied any liability thereon; that complainant had no right to declare the $15,000 note due and payable as alleged in the bill; that the real property described in the alleged trust deed was purchased prior to November 3, 1927, by Alexander and James Weir in equal shares; that immediately after the said purchase they went into possession as tenants in common and were such owners and in possession thereof until the death of Alexander Weir; that on August 4, 1928, there was recorded, in the office of the recorder of deeds of Cook county, what purports to be a quit-claim deed from James Weir to Alexander Weir conveying said real xxxxxx property described in the alleged trust deed, that said quit-claim deed was never signed nor acknowledged by the said James Weir, and that his name was forged thereto; that Alexander Weir (in his lifetime) and James Weir were copartners as farmers, in Cook county, Illinois, on land adjoining the land described in the alleged trust deed; that the land described in the trust deed was purchased and used as a pasture by Alexander Weir and James Weir, and since the death of Alexander has been used as a pasture by plaintiffs in error; that on November 3, 1927 (the date of the alleged trust deed), Alexander Weir was the owner of only one-half of said real property and the other undivided one-half of said property was owned by James Weir, of which fact the Youngs and the complainant had notice.

The master found that the principal note, interest notes and trust deed were executed and delivered by Alexander Weir, a bachelor, as alleged in the bill; that interest coupons numbers 1 and 2 have been fully paid and that default was made in the payment of interest notes 3, 4 and 5; that on March 22, 1929, the complainant loaned to one W. K. Young the sum of $5,000, evidenced by a check payable to the order of said Young, "and received from said W. K.

Young, a collateral note of said date together with the above principal note, interest coupons and trust deed, which principal note, interest coupons and trust deed were given as collateral security to secure the payment of said collateral note for said sum of $5,000;" that on March 15, 1930, complainant made another loan to said W. K. Young "upon said security so deposited in the sum of $1,500 as evidenced by check * * * drawn to the order of said W. K. Young and by him endorsed and cashed, which check was signed by said complainant. That to secure said additional and further sum so borrowed by him said W. K. Young executed and delivered to said William T. Woodley, complainant herein, a further and other collateral note, dated March 17, 1930, due thirty days after date, and cancelled said collateral note heretofore mentioned. * * * That from the testimony and evidence * * * introduced I find that on to-wit: August 2, 1930, a sale was had of the collateral security given with said collateral note which security or collateral was the principal note and trust deed hereinabove mentioned and being foreclosed herein, and that at such sale said collateral was on said date bid in and purchased by said William T. Woodley, the complainant herein. * * * That complainant by reason of said sale * * * became the owner of same and is now the owner and holder of said principal note and interest and trust deed securing same, and was such owner and holder at the time of the filing of the bill * * *; that at the time of the execution and delivery of said principal note and trust deed by Alexander Weir * * * Alexander Weir was the owner of and was possessed of, an undivided one-half interest in and to the premises hereinabove described and that said interest was the only interest that could have been conveyed by Alexander Weir at the time of the execution of said trust deed." The master further found that on August 4, 1928, a quit-claim deed was filed for record in the recorder's office of Cook county, "purporting to have been executed

by James Weir, one of the defendants herein, on to-wit: August 2, 1928, and acknowledged by him on to-wit: August 3, 1928, before one Albert R. Gates, a notary public * * *. That said quit claim deed conveyed and quit claimed to Alexander Weir the premises hereinabove described and which are sought to be foreclosed herein;" that Alexander Weir died on March 15, 1929, and on March 25, 1929, letters of administration were issued by the Probate court of Cook county to the defendant Agnes Weir. The master further found "that the signature of the defendant, James Weir, was forged to said quit claim deed. That the existence of said trust deed being foreclosed herein was also brought to the attention of said Agnes Weir at or about said time. That Alexander Weir, Agnes Weir and James Weir, and other of the defendants lived together upon the premises adjacent to the premises being foreclosed herein in November, 1928, and prior thereto and up to March 15, 1929, when Alexander Weir departed this life, and that up to said last mentioned date I find from the testimony and evidence offered and introduced that the question of the forgery of said quit claim deed and the legality or genuineness of said trust deed and note above mentioned, was not questioned nor discussed with Alexander Weir, by James Weir, Agnes Weir, nor any of said defendants, and I further find that inasmuch as no action was taken by said parties that the execution of said trust deed and note was the act and deed of said Alexander Weir and given by him for the purposes therein set forth. That no effort was made by James Weir, Agnes Weir nor any of the other defendants after the discovery of said forgery or alleged forgery of said quit claim deed to obtain from Alexander Weir during his lifetime, a cancellation of same or a deed to rectify said alleged forgery, nor since his death has any proceeding been instituted questioning the genuineness of either of said deeds except by the answers filed

and the testimony and evidence offered in this cause and I further find that the negligence and acquiescence of said parties as to said forgery amounted to a ratification of and an acceptance by them of said deed and conveyance, and that they are estopped from setting up or asserting said forgery in these proceedings."

The decree found that there was due complainant, "upon said principal note, the sum of $15,450 with interest thereon from the 3rd day of May, 1929, at seven per cent per annum;" that there was also due complainant for his solicitor's fees the sum of $1,500, and that the total amount due the complainant (exclusive of an allowance of $120.55 for reporter's fees) was $20,093.03. The decree also found that the complainant had a lien on the entire premises for said sum and was entitled to foreclosure and sale and "that the rights and interests of all the other parties to this cause in and to said premises are subject and inferior to the lien of the said trust deed held by said complainant."

The main contention of the plaintiffs in error is "that complainant was not an innocent holder of the alleged trust deed and notes before maturity, and that he purchased the same subject to all defects therein and to all defenses thereto; that defendants are not estopped from asserting the forgery of the quit-claim deed; that complainant is not entitled to a foreclosure of the trust deed and to a sale of the premises; and that the report of the Master in Chancery and the decree are both contrary to the law and the evidence, and that the decree is excessive."

After an exhaustive study of the evidence we have reached the conclusion that justice demands that there be a retrial of this cause. The solicitor for the plaintiffs in error did not, in our judgment, properly protect and safeguard the rights of his clients. For instance, he permitted the complainant to introduce hearsay evidence of a most important character in support of his claim.

and the testimony was vigorous efforts to sign some sort of further file that the negligence and acquiescence of each particular as to said property amounted to a ratification of and an acquiescence by them of said deed and conveyance, and that they are estopped from pleading up by asserting said property to their benefit."

The source found that there was the complainant, "upon said principal note, the sum of $15,000 with interest thereon from the 3rd day of July, 1899, at seven per cent per annum" that there was also due complainant for his solicitor's fees the sum of $1,000, and that the total amount due the complainant (assignee of an option note of $10,000 for repayment's fees) was $27,000. The master also found that the complainant had a lien on the entire premises for said sum and was entitled to foreclosure and sale and "that the rights and interests of all the other parties to this suit be and is said premises are subject and inferior to the lien of the said mortgage deed held by said complainant."

The main contention of the plaintiffs in error is "that complainant was not an innocent holder of the alleged trust deed and notes before maturity, and that he purchased the same subject to all defects therein and to all infirmes therein which existed are not relapsed from asserting the forgery of the quit-claim deed; that complainant is not entitled to a foreclosure of the trust deed and is a sale of the premises; and that the report of the Master in Chancery and the courts are both contrary to the law and the evidence, and that the court is mistaken."

After an exhaustive study of the evidence we have reached the conclusion that justice demands that there be a reversal of this cause. The solicitor for the plaintiffs in error who was, in our judgment, strongly urged and defended the rights of his client. The instrument, by permitting the complainant to introduce hearsay evidence of a most important character in support of his claim,

The complainant testified that he acquired the notes in question from W. K. Young (who died after the pleadings in this cause had been settled but before the master's hearing) as collateral for two loans, one of $5,000 and another of $1,500, made to Young by the complainant. During the examination of the complainant the following occurred: "Q. (by Mr. Fireman, complainant's solicitor) Did you have a conversation with W. K. Young at the Wesley Hospital? A. Yes, sir. Q. When did that conversation take place? A. That was about -- that would be about the latter part of November. Q. Did you have a conversation with W. K. Young at the hospital after the answer of Agnes Weir was filed to this? A. Yes. Q. Did you take that answer with you to the hospital? A. Yes, sir. Q. Did you exhibit that answer to W. K. Young? A. I did. Q. Did you have a conversation with him concerning the allegations in that answer? A. Yes, sir. Q. What was the conversation? A. He told me therewas absolutely nothing to it, that the trust deed and notes were absolutely right and they were properly signed by the persons who signed them, and there was not one thing in their answer that was true. Q. Did you ask Mr. Young concerning the allegation in the answer of Agnes Weir that they were issued without consideration? A. I don't remember that particular part of the conversation. Q. Did you have a conversation with him as to whether or not the documents, which are Complainant's Exhibits 1 to 10, inclusive, were forgeries? (Complainant's exhibit 1 is the alleged trust deed of Alexander Weir. Complainant's exhibits 2 to 10 are the principal note for $15,000, the interest coupons, and two checks made by the complainant and alleged to have been given to William K. Young by the complainant.) A. Yes, sir. Q. Did he say that he saw Alexander Weir sign these papers? A. He did. Mr. Hutchinson (Hutchison, solicitor for plaintiffs in error): Now I move that that be stricken. It is not all of the evidence, all of the con-

is talking about the bill. Mr. Hutchinson: He said he explained it. Mr. Fireman: I am satisfied to strike out the words 'I explained.' I am instructing Mr. Woodley to tell the conversation only, what you said and what he said. He said this, and I said that. Mr. Hutchinson: Yes. The Witness: A. He said there was nothing in that answer that was true, that the trust deed and the notes were perfect, and he had seen them signed, and also the deed, the quit claim deed that was mentioned in the bill. The Master: Q. Do you mean bill or answer? A. Answer. Answer, pardon me. I am not a lawyer. I get those things mixed up. Mr. Fireman: The answer of Agnes Weir? A. Yes, the answer of Agnes Weir. Q. You say the quit claim deed was also genuine. Are you referring to the quit claim deed of James Weir to his brother, Alexander Weir? A. Yes, sir. Q. That is the quit claim deed that is referred to in the answer as being a forgery? A. Yes, sir. Q. What did T. M. Young say with reference to that? Q. He said it was absolutely the true signature of Mr. Weir. Q. By Mr. Weir you mean James Weir? A. Yes, sir. Mr. Hutchinson: Wait a minute. That he saw him sign it, he said that too, didn't he? A. He said he saw him sign these papers. Mr. Hutchinson: Yes, that is what we want." During the recross-examination of the witness by the solicitor for plaintiffs in error he testified that Young told him that the solicitor for plaintiffs in error (Mr. Hutchison, who was a cousin of the Weirs) had told him (Young) that the signature to the notes in question "was Alexander Weir's signature." This answer was not even responsive to the question, but the solicitor allowed it to stand without objection. In this court he seeks to justify his conduct in the matter of permitting all of this important hearsay evidence to stand, upon the ground that it is a fundamental principle of law that it is not necessary to object to incompetent evidence in a chancery proceeding. While it is hardly necessary to

in taking about the bill. Mr. Buckingham: Do could be explained
it. Mr. Plummer: I am prepared to strike out the words "I
explained." I am instructing Mr. Young to call the commissioner
only, what you could and what be said. He said this, and I said
that. Mr. Buckingham: Yes. The witness: A. He said there was
nothing in that answer that was true, that the street road and the
water were parted, and he had some claim against, and also the deed,
the quit claim deed that was mentioned by the bill. The Judge:
Q. Do you mean bill or report? A. Report. Jewett, quite so.
I am not a lawyer. I put these things about by Mr. Plummer. The
answer of Lynn Tuttle? A. Yes, the answer of Lynn Tuttle. Q. The
day the quit claim was also genuine. Are you interested in the
quit claim deed of Jesse Tuttle to his brother, Jonathan Tuttle? A.
Yes, sir. Q. That is the quit claim deed that is referred to in
the answer as being a forgery? A. Yes, sir. Q. Had did A. D.
Young any with reference to that? Q. He said it was absolutely
the true signature of Mr. Tuttle. Q. Mr. Mr. Tuttle was never
Judge? A. Yes, sir. Mr. Buckingham: That a minute. That he was
his wife is, he said that was, didn't he? A. He said to me, the
plan there papers. Mr. Buckingham: Yes, that is what we want.
Putting the recross-examination of the witness by the solicitor for
plaintiff: Is error be instructed that Young had him, the
solicitor for plaintiff, in error (Mr. Buckingham, counsel
of the jury) had told him (Young) that the signature to the notes
in question was Jonathan Tuttle's signature." The answer was not
even responsive to the question, but the solicitor objected it is
plain without objection. In this court, he seems to be partly his
conduct in the matter of permitting all of this important testimony
evidence to stand, upon the ground that it is a fundamental principle
of law that it is not necessary to object to incompetent evidence
in a chancery proceeding. While it is hardly necessary to

notice such a contention, we may say that hearsay evidence, if not properly objected to, has probative force.

We are also of the opinion that the solicitor did not properly contest the bona fides of the alleged transaction between W. K. Young and the complainant in reference to the notes in question. Little, if any, effort was made in that regard, although there are certain circumstances in the case that throw suspicion upon the entire transaction. The evidence tends to prove that Young was insolvent at that time, yet the complainant appears to have made no real inquiry touching Young's ownership of the notes and trust deed. Nor was the matter of the alleged sale of the collateral by the complainant properly inquired into by the solicitor for plaintiffs in error.

The complainant contends that the defendants are estopped from asserting forgery as to the quit-claim deed; that "it is not complainant's theory that the defendants were estopped by affirmative acts, but rather by their silence, their inactivity," and he cites Oliver v. Ross, 239 Ill. 624, and several other cases akin to it, in support of the contention. In the case cited the court says (p. 640):

> "Estoppel may arise from silence as well as words where there is the duty to speak and the party on whom the duty rests has an opportunity to speak and knowing the circumstances keeps silent. It is the duty of a person having a right and seeing another about to commit an act infringing upon it, to assert his right. (Milligan v. Miller, 253 Ill. 511.)" (Italics ours.)

We find no merit in complainant's contention. The evidence shows that the plaintiffs in error were in the possession of the property; that they did not know the complainant and were not aware that he held the notes and trust deed and claimed to own them. He made both of the alleged loans to Young long before he made any inquiries of them in reference to the trust deed, and he admits that when he first spoke to Agnes Weir she told him that the "mortgage" was a forgery. The complainant was engaged in the real estate business

[illegible] conditions, we may not hold [illegible] the property objected to, his predecessor [illegible].

In the view of the opinion that the mortgagor did not properly assert the home right of the alleged tenancies between M. & Tenn and the complainant in reference to the notes in question, [illegible], if any, effect was made in that regard, although there are certain circumstances in the case that tend [illegible] upon the notes themselves. The evidence tends to prove that [illegible] transaction at that time, yet the complainant appears to have made no visit [illegible] concerning of the notes and trust deed. But on the matter of the alleged sale of the mortgaged by the complainant personally [illegible] for the defendant the plaintiffs be [illegible].

The complainant contends that the defendants are estopped from asserting property as the mortgagor, [illegible] "it is not complainant's theory that the defendants were induced by affirmative acts, but rather by their silence, their inactivity," and he cites Fisher v. Ross, 220 Ill. 474, and several other cases with to its support of the contention. In the main stand the cases upon the state.

"Estoppel may arise from silence as well as spoken words. Where it is the duty to speak and the party on whom the duty rests has an opportunity to speak and remedy the misunderstanding being misled, it is the duty of a person having a right and knowing another about to act upon it, to speak and assert his right. Illinois Cent. R. R. Co. v. Phillips, 49 Ill. 234." (Italics ours.)

We find no merit in complainant's contention. The evidence shows that the plaintiffs in error were in the possession of the property; that they did not know the complainant and were not aware that he held the notes and trust deed and claimed to own them. Be that both of the alleged loans to Tenn long before he made any inquiries of them in reference to the trust deed, and he admits that when he first spoke to Agnes Tolt the told him that the "mortgage" was a forgery. The complainant was engaged in the real estate business

for twenty-five years and was cognizant of the customary way of buying and selling mortgages, and during that entire period of time he had dealings with Young. He testified that although he passed the land in question he never "discussed the occupancy of the land;" he merely "looked at it from the roadway." He does not appear to have seen an abstract or to have examined, in any way, the title to the premises prior to the making of the alleged loans. The first time he made any investigation of the notes and trust deed was when he visited the farm in May, 1930, which was long after the time he made the loans and after the second collateral note had become due. There is nothing in the evidence to show that the complainant was induced to make the loans or to accept the notes as collateral security by reason of any affirmative conduct or silence on the part of any of the plaintiffs in error. They were farmers, living upon the land adjoining the premises in question and using the latter as a pasture, and as soon as the complainant called upon them and claimed to be the owner of the notes and trust deed, Agnes Weir told him that they did not know that there was a mortgage on the premises and that if there was it was a forgery. The theory of complainant, at the outset of the hearing, was that the signature to the quit-claim deed was the true signature of James Weir and not a forgery, and it was only after it was proven beyond all doubt that it was a forgery that that theory was abandoned and the estoppel theory invoked.

While we are satisfied that it would be a serious miscarriage of justice to permit the present decree to stand, nevertheless, we are not satisfied, in the present state of the record, that the bill should be dismissed for want of equity. Accordingly, the decree is reversed, and the cause is remanded with directions to the chancellor to have the cause again referred to a master for a hearing de novo.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

124 A

36429

JOHN J. FLEMING, as Trustee, etc.,
Appellee,

v.

MICHAEL OLYNIEC and VERONICA OLYNIEC,
his wife,
Defendants.

In the Matter of the Petition of
C. L. Noruk, Intervening Petitioner,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

272 I.A. 622

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John J. Fleming, as trustee, etc., filed his bill against Michael Olyniec and Veronica Olyniec, his wife, to foreclose a second mortgage upon certain real estate and upon his motion a receiver was appointed, who took possession of the property. Thereafter leave was granted C. L. Noruk to file his intervening petition, but, in the same order, upon motion of complainant, the petition was stricken from the files and the motion of the petitioner for an order upon the receiver to deliver possession of the premises to him was denied. The intervening petitioner has appealed. The complainant has not filed a brief in this court.

The intervening petition was, in substance, the same as the petitions that were before this court in Altschuler v. Landelman, 264 Ill. App. 106, and Consumers Bond & Mortgage Co. v. Radin, 266 Ill. App. 141. In Altschuler v. Landelman we held that the appointment of a receiver to take charge of mortgaged premises under a junior mortgage does not destroy the right of a prior mortgagee to take possession; that there is no merit in the contention that the

JOHN J. McLEAN, as Trustee, etc.,
Appellee,

v.

STANLEY STATON and VIRGINIA STATON,
his wife,
Intervenors.

In the Matter of the Petition of
G. L. Brown, Intervening Petitioner,
Appellant.

No. [illegible] in which Judgment was entered on the [illegible].

John J. McLean, as trustee, who, that he will sometimes called Clarice and Virginia Clarice, his wife, is foreclosing a second mortgage upon certain real estate and upon his motion a receiver was appointed, who took possession of the property. Thereafter leave was granted G. L. Brown to file his intervening petition, but, in the same order, upon motion of complainant, the petition was stricken from the files and the motion of the petitioner for an order upon the receiver to deliver possession of the premises to him was denied. The intervening petitioner has appealed. The complainant has not filed a brief in this court.

The intervening petition was, in substance, the same as the petitions that were before this court in Blumenfeld v. McLaughlin, 206 Ill. App. 324, and Commercial Loan & Mortgage Co. v. Leila, 206 Ill. App. 326. In Blumenfeld v. McLaughlin we held that the appointment of a receiver to take charge of mortgaged premises under a junior mortgage does not destroy the right of a prior mortgagee to take possession that there is no merit in the contention that the

latter can then have the receivership only extended as to it, and that it is error to dismiss, for want of equity, an intervening petition demanding that a receiver, appointed at the instance of a junior mortgagee, surrender possession to a first mortgagee; that there is no material difference or distinction between the rights of a first mortgagee in possession of premises prior to an appointment or attempted appointment of a receiver at the instance of a junior mortgagee, and the rights of a first mortgagee not asserted until after a receiver has been appointed and is in possession at the instance of a junior mortgagee; and that the appointment of a receiver at the instance of a junior mortgagee can ~~only~~ be made only without prejudice to the right of the first mortgagee to the possession of the premises, if he sees fit within a reasonable time to assert that right. In Consumers Bond & Mortgage Co. v. Nadin, after a further consideration of the important questions involved, we adhered to the conclusions reached in Altschuler v. Mandelman. Counsel for appellant inform us that the chancellor in the instant case stated that he was familiar with the two decisions of this branch of the court, but that he did not agree with the reasoning of the same, that they were not binding upon him and that he would not follow the law as stated therein. This chancellor adopted the same attitude in the recent case of Plotke v. Greenberg, Ill. App. Ct. Gen. No. 36557, opinion filed October 10, 1933. The order that we now enter in the instant case is binding upon the Circuit court.

The order of the Circuit court, dated October 11, 1932, striking the intervening petition from the files and denying the motion of the intervening petitioner for an order upon the receiver to deliver possession of the premises to the intervening petitioner, is reversed, and the cause is remanded with directions to the chancellor to enter an order in accordance with the prayer of the intervening petition. REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

latter can then have the recordings only admitted as to it, and that it is error to dismiss, for want of evidence, an interrogating petition requesting that a receiver, appointed on the insistence of a junior mortgagee, intervene possession in a first mortgagee that there is no material difference in distinction between the rights of a first mortgagee in possession of premises prior to an appointment of a receiver, and the rights of a first mortgagee who secures such an alternate possession of a receiver on the insistence of a junior mortgagee, and the rights of a first mortgagee who secures until after a receiver has been appointed due to in possession on the insistence of a junior mortgagee; and that the appointment of a receiver at the instance of a junior mortgagee can be made only without prejudice to the rights of the first mortgagee to the possession of the premises, if he were let within a reasonable time to assert that right. In Commercial Bank & Mortgage Co. v. Leslie, after a further consideration of the important questions involved, we adhered to the conclusions reached in Kilmoulin v. Lockhart. Counsel for appellant inform us that the chancellor in the instant case stated that he was familiar with the bad relations of this branch of the court, but that he did not agree with the reasoning of the cases, that they were not binding upon the and that he would not follow the law as stated therein. This chancellor adopted the same attitude in the recent case of Tabler v. Strickland, 121. Ala. 64, Co. 1898, opinion filed October 20, 1898. The order that we now review in the instant case is stating upon the ground that

The rule of the Tabler case, supra, filed October 21, 1898, adopting the intervening petition from the file was violating the motion of the intervening petitioner for an order upon the receiver to deliver possession of the premises to the intervening petitioner, is reversed, and the order is remanded with directions to the chancellor to enter an order in accordance with the prayer of the intervening petition.

REVERSED AND REMANDED WITH DIRECTIONS.

125 A

36449

IRWIN T. GILRUTH, Receiver for Stony Island State and Savings Bank, for use of Ellen N. Norton, Appellee,

v.

LAWRENCE BARRETT, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 623

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, Irwin T. Gilruth, Receiver for Stony Island State and Savings Bank, for use of Ellen N. Norton, plaintiff, obtained a judgment by confession against Lawrence Barrett, defendant, for $444.50. The defendant filed a written motion and an affidavit in support thereof, to vacate the judgment, and he has appealed from an order overruling his motion. The following is the statement of claim:

"Plaintiff's claim is for rent accrued and now due and payable upon a lease of certain real estate, which lease is hereto attached and made a part of this statement of claim, said lease being dated the Eighteenth day of August, 1930 executed by the plaintiff as lessor and the defendant as lessee whereby the plaintiff demised to the defendant the premises therein described for and during the term of 10/15/30 to 9/30/31 and next ensuing, the defendant thereby undertaking and agreeing to pay to the plaintiff therefor during said term the monthly rent of Ninety-five dollars ($95.00) payable on the first day of each month * * * by virtue of which demise, the sum of Three Hundred Eighty dollars ($380.00) of the rent aforesaid for the month of June, July, Aug. & Sept., 1931, became due and payable from the defendant to the plaintiff and still is in arrears and unpaid to the plaintiff wherefore the plaintiff sues for the sum of Three Hundred Eighty dollars ($380.00) of the rent aforesaid, together with the sum of Sixty-four and 50/100 dollars, ($64.50) for reasonable attorney's fees provided for in said lease." (Italics ours.)

Attached to the statement of claim was the following:

"Affidavit of Execution of Lease and of Plaintiff's Claim

" * * *

"Charles A. Norton, being first duly sworn on oath states that he is agent for the plaintiff in the above entitled cause; that the nature of plaintiff's demand is a claim for rent accrued and now

KITTS T. SIMONS, Receiver for Henry Island State and Savings Bank, for use of Alice E. Horton, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
[illegible] PLAINTIFF, Appellant.	272 I.A. 629

Mr. JUSTICE PARKER DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, Kitts T. Simons, Receiver for Henry Island State and Savings Bank, for use of Alice E. Horton, plaintiff, obtained a judgment by confession against Lorenzo Barrett, defendant, for $440.00. The defendant filed a written motion and an affidavit in support thereof, to vacate the judgment, and be has appealed from an order overruling his motion. The following is the statement of claim:

"Plaintiff's claim is for rent accrued and now due and payable upon a lease of certain real estate, which lease is herein referred and made a part of this statement of claim, and lease being dated the eighteenth day of August, 1920 executed by the plaintiff as lessor and the defendant as lessee covering the plaintiff's desired to the defendant the premises herein mentioned for and during the term of 10/12/20 to 5/31/21 and more specially, the defendant thereby covenanted and agreed to pay to the plaintiff thereby during said term the monthly rent of Thirty-Five Dollars ($35.00) payable on the first day of each month, a - - by virtue of which demise, the sum of Three Hundred Forty Dollars ($340.00) of the rent aforesaid for the month of June, 1921, and Three Hundred dus and payable from the defendant to the plaintiff and will be in arrears and unpaid by the plaintiff unless the plaintiff was for the sum of Three Hundred Forty Dollars ($340.00) by the rent aforesaid, together with the sum of Thirty-Five Dollars ($35.00) for reasonable attorney's fees provided for in said lease." (Italics ours.)

Attached to the statement of claim was the following:

"Affidavit of execution of lease and of Plaintiff's claim - - -

"Affiant is - - - being first duly sworn on oath states that he is - - - for the plaintiff in the above entitled cause; that the nature of plaintiff's demand is a claim for rent accrued and now

due and payable under the lease described in the foregoing statement of claim, and that there is due to plaintiff from the defendant after allowing to the defendant all just credits, deductions and set-offs the sum of Three Hundred and Eighty ($380.00) dollars ($380.00), rent for the period stated in said statement of claim, in addition to said attorney's fees.

"Affiant further says that he is acquainted with the handwriting of said plaintiff and defendant, that the signatures to said lease are the genuine signatures of said plaintiff by Chas. M. Hickman, Ass't. Trust Officer and defendant Laurence Barrett and that said lease was duly executed by said plaintiff and defendant, and that said defendant is still living." (Here follow signature and jurat.)

Also attached to the statement of claim was a written lease, by the terms of which "Stony Island State and Savings Bank, Trustee," demised certain premises in Chicago to the defendant, Lawrence A. Barrett, for the term beginning October 15, 1930, and ending September 30, 1931, at a rental of $95 per month. The lease is signed as follows:

"Stony Island State Savings Bank not personally
but as Trustee under Trust Agreement dated 11-15-29
and known as Trust No. 215.
"By Chas.M Hickman
"Ass't. Trust Officer (Seal)
"Laurence A. Barrett (Seal)"

Clause Fifteenth of the lease provides:

"If default be made in the payment of the rent hereinabove reserved, or of any installment thereof or herein provided, Lessee does hereby irrevocably constitute any attorney of any Court of Record in this State, attorney for him and in his name, from time to time, to waive the issuance of process and service thereof, to waive trial by jury, to confess judgment in favor of Lessor, his heirs, executors, administrators or assigns, and against Lessee, for the amount of rent which may be then due, by virtue of the terms hereof, or of any extensions or renewals hereof, or by virtue of any holdover after the termination hereof, and which may be in default, as aforesaid, together with the costs of such proceedings, and a reasonable sum, but at no time less than Ten Dollars for plaintiff's attorney's fees in or about the entry of said judgment, and for said purposes to file in said cause his cognovit thereof, and to make an agreement in said cognovit, or elsewhere, waiving and releasing all errors which may intervene in any such proceeding, and waiving and releasing all right of appeal and right to writ of error, and consenting to an immediate execution upon such judgment; and Lessee hereby confirms all that said attorney may lawfully do by virtue hereof. * * *"

A number of reasons are assigned in the motion to vacate the judgment by confession, but in the determination of this appeal it is necessary to refer to only the following:

"The record in this case discloses on its face that the power of attorney contained in the lease attached to the Statement of Claim herein, has been exceeded in the cognovit, and the judgment entered herein by reason thereof, is null and void.

" * * *

"Neither the plaintiff therein, Irwin T. Gilruth as Receiver for Stony Island State and Savings Bank or Allen N. Norton, for whose use this suit has been brought, are parties to the lease upon which judgment was confessed herein, and the Statement of Claim in this case does not in any way disclose the interest of either of said parties or their right to maintain the suit or obtain judgment on said lease."

The defendant contends that the judgment entered by confession, under and by virtue of the power of attorney contained in the lease, is null and void, and that this fact is apparent from the face of the record. The contention is a meritorious one. The lease contains a warrant of attorney whereby the lessor, "his heirs, executors, administrators or assigns," were given the right to confess judgment. The lessor was Stony Island State and Savings Bank, Trustee, under a trust agreement. There is no warrant of attorney granted to Gilruth as receiver of the Stony Island State and Savings Bank nor to Allen N. Norton. Both of these parties are strangers to the lease. Stony Island State and Savings Bank, Trustee under Trust Agreement No. 215, is not named in the statement of claim, cognovit nor judgment. There is nothing in the statement of claim nor the record to show that Gilruth, as receiver, or Allen Norton, succeeded to the interest of Stony Island State and Savings Bank, Trustee under Trust Agreement No. 215. Indeed, as the defendant argues, there is nothing in the record to show that Gilruth, Receiver, or Allen N. Norton had any interest in trust agreement No. 215.

The power to confess a judgment must be clearly given and strictly pursued, and a departure from the authority conferred will render the confessed judgment void. Many cases might be cited

in support of this principle, but we need refer to only a late decision, Wells v. Durst Chevrolet Co., 341 Ill. 108.

The bill of exceptions does not contain a copy of the instrument sued upon, viz: the lease, and the plaintiff seeks to evade the effect of the defendant's contention by contending that the lease is not before this court and cannot be considered by us in determining the present appeal. In support of this contention plaintiff cites Alton Banking and Trust Co. v. Gray, 347 Ill. 99. In that case there was a judgment by confession in the city court of Alton and the judgment was entered upon a note containing a power of attorney to confess judgment, and which was attached to the declaration. The Supreme court held that where a judgment by confession is taken in term time and the bill of exceptions, on review of the overruling of a motion to vacate, fails to show that the note sued on was introduced in evidence, the deficiency in the bill of exceptions is not cured by the fact that a copy of the note was attached to the declaration, even though the declaration is a part of the common law record, as a copy of the document sued on is no part of the declaration in an action at law. The court further held (p. 107):

"The same presumptions are indulged in favor of a judgment by confession entered in term time as in a judgment entered by service of process. * * * Every presumption will be indulged in favor of the judgment, even to the extent of presuming that a sufficient warrant of attorney was produced and proved to the court though another which was insufficient appeared in the files."

The confession of judgment in the instant case was entered in the Municipal court of Chicago, and the case cited by plaintiff, wherein a judgment of a city court was involved, does not apply. In Flew v. Board, 274 Ill. 232, 235, the court said:

"By the regular practice at law a copy of a writing upon which a suit is brought is no part of a declaration. (Pearsons v. Lee, 1 Scam. 193; Marlow v. Boswell, 15 Ill. 56; Franey v. True, 26 id. 184; Gage v. Lewis, 68 id. 604.) By the exceptional practice prescribed for the municipal court, the statement of claim must consist of a statement of the account or of the nature of the

in support of this principle, but we must refer to only a late decision, *Tulk v. Moxhay* (1848) 2 Ph. 774.

The gift of encyclopedias does not contain a copy of the instrument upon which the donee, viz: the donor, and the plaintiff seeks to evade the effect of the defendant's contention by contending that the donee is not entitled to have such instrument be considered by us in determining the present appeal. In support of this contention plaintiff cites *Jones Dentist ... v. Hurst* 24 Ill. App. 24. In that case there was a judgment by confession in the city court of Alton and the judgment was entered upon a note containing a power of attorney to confess judgment, but there was attached to the note, the instrument was found to be a judgment by confession in form and the gift of encyclopedias in the donee's possession is taken in form also and the gift of encyclopedias, on the review of the overruling of a motion to vacate. Tells to show that the note sued on was introduced in evidence, the defendant in the gift of encyclopedias to her owner by the fact that a copy of the note was attached to the *judgment*, even though the confession is a part of the common law record, as a copy of the document sued on is no part of the *judgment* in an action at law. The court further held (p. 24):

"The same presumptions are indulged in favor of a judgment by confession entered in this state as in a judgment entered by courts of process. * * * Every presumption will be indulged in favor of the judgment, even to the extent of presuming that a sufficient warrant of attorney was produced and proven to the court though another which was insufficient appeared in the file."

The confession of judgment in the instant case was entered in the municipal court of Chicago, and the case cited to plaintiff's attorney a judgment of a city court was involved, but not "city". In *Jones v. Hurst*, 24 Ill. App. 24, the court said:

"By the regular practice in the entry of a written warrant which is such as occurs in an part of a judgment. (Lawrence v. Lee, 1 Ham. 128; Butler v. Kennedy, 13 Ill. 24; Tandy v. Tidd, 24 Ill. 124; Jones v. Jones, 24 Ill. 24). In the examined case the practice prescribes for the municipal court, the statement of claim must consist of a statement of the account or of the nature of the

demand, and it is called a bill of particulars. (Gilbert's Practice in the Municipal Court, 198.) In the statement in this case there was nothing except the copies of the notes to give the appellees any information whatever of the dates, amounts, maturity, indorsements, by what officers executed, or any other particulars necessary to a statement of a cause of action against the appellees. The copies of the notes were a necessary part of the statement of claim, and cannot be regarded as copies annexed to a declaration where the cause of action is stated in the declaration itself."

In Wells v. Durst Chevrolet Co., supra, the judgment of the Municipal court of Chicago was entered upon a power of attorney contained in a lease which was made a part of the statement of claim, and the Supreme court considered the lease in determining the question as to whether or not there had been a departure from the authority conferred. From the order denying the motion to vacate, in that case, an appeal had been prosecuted to this court, and we find by an inspection of our records (Appellate court Gen. No. 33,075) that the abstract shows that the bill of exceptions did not contain a copy of the lease.

The plaintiff also contends that "a motion to vacate a judgment confessed in term time even though power of attorney was insufficient to give the lower court jurisdiction, must show that defendant has a legal or equitable defense," and in support of this contention cites a number of cases none of which applies to the instant appeal. Here the defendant contends that the court lacked jurisdiction to enter the judgment and that therefore it was void ab initio. We have held that defendant's contention is a meritorious one, and in such case he is not obliged to set up in his affidavit a defense to the claim upon the merits.

The judgment order of the Municipal court of Chicago, of September 29, 1932, overruling the motion of the defendant to vacate the judgment entered by confession on July 21, 1932, is reversed and the cause is remanded with directions to the trial court to sustain the motion and to vacate the judgment by confession entered on July 21, 1932.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

126 A

36458

THE BALTIMORE & OHIO RAILROAD COMPANY, a corporation, ~~Defendant in Error,~~ Appellee

v.

CHICAGO WOOD PRODUCTS, INC., ~~Plaintiff in Error,~~ Appellant

Appeal from ~~ERROR TO~~ MUNICIPAL COURT OF CHICAGO.

272 I.A. 623[2]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in an action in contract. The case was tried by the court and there was a finding in favor of plaintiff and its damages were assessed at the sum of $193.68. Judgment was entered upon the finding and defendant ~~has sued out this writ of error~~ appealed.

The case was tried upon the following stipulation:

"1. That plaintiff is and during the period of this action was a common carrier by railroad between the various states of the United States * * *.

"2. That on January 21, 1931, defendant as consignor shipped one carload of bulk shavings weighing 41,100 pounds from De Queen, Arkansas, to itself as consignee at Fairmont, West Virginia, via the line of the Kansas City Southern Railway Company and the Missouri, Kansas & Texas Railway Company, which companies transported the said carload of shavings from De Queen, Arkansas, to East St. Louis, Illinois, where same was delivered to plaintiff as delivering carrier.

"3. That Kansas City Southern Railway Company issued a bill of lading to defendant * * * dated at De Queen, Arkansas, January 21, 1931.

"4. While said car containing said shavings was being transported over the railroad line of plaintiff between East St. Louis, Illinois, and Fairmont, West Virginia, defendant sent a reconsigning order, defendant's number F2161-3, dated January 22, 1931 to the freight agent of plaintiff at Fairmont, West Virginia, directing him to reconsign said car to Domestic Coke Corporation, Fairmont, West Virginia, and to place car upon the tracks of Domestic Coke Corporation.

Plaintiff sued defendant in the Municipal Court of Chicago in an action in contract. The case was tried by the court and there was a finding in favor of plaintiff and the damages were assessed at the sum of $180.00. Judgment was entered upon the finding and defendant has sued out this writ of error.

The case was tried upon the following stipulation:

"1. That plaintiff is and during the period of this action was a common carrier by railroad between the various states of the United States * * *.

"2. That on January 12, 1931, defendant as consignor shipped one carload of milk cleavage weighing 41,300 pounds from Le Center, Minnesota, to itself as consignee at Fairmont, Indiana, via the line of the Kansas City Southern Railway Company and the Illinois Central Railroad Company, which carriers transported the said carload of cleavage from Le Center, Minnesota, to East St. Louis, Illinois, where same was delivered to plaintiff as delivering carrier.

"3. That Kansas City Southern Railway Company issued a bill of lading as follows: * * * Dated at Le Center, Minnesota, January 12, 1931.

"4. While said car containing said cleavage was being transported over the railroad line of plaintiff between East St. Louis, Illinois, and Fairmont, Indiana, defendant, acting as a reconsigning carrier, furnished a Santa Fe-Santa Fe Refrigerator Car 1021 to the freight agent of plaintiff at Fairmont, Indiana, directing the reconsigning said car to Lancaster, Ohio (Lancaster, Ohio, being the terminal, and to place the terms of interstate rate tariffs.

"5. Said car containing said shavings arrived at Fairmont, West Virginia, on January 27, 1931, at which time plaintiff placed said car upon the tracks of the Domestic Coke Corporation, which corporation refused to accept said shipment.

"6. Thereupon plaintiff sent a * * * telegram to defendant at Chicago, Illinois, in words and figures as follows:

"Baltimore, Md Jan 30 1931 11:00 am
"Chicago Wood Products Inc
"Chicago Ill

"Fairmont West Virginia Erie six eight ten five Shavings consigned to you for delivery to Domestic Coke Corp refused account quality Rush blading orders

"C C Glessner
"Bando

which telegram was received by defendant on the same day.

"7. That C. C. Glessner is the General Freight Claim Agent of plaintiff company at Baltimore, Maryland.

"8. To the above quoted telegram defendant on January 30, 1931, made reply in a * * * telegram * * * as follows:

"Chicago Ill Jan 30 1931 3:20 PM

" C C Glessner, FGCA B and O RR Co.

" Retel Erie 68105 notify shippers Home Lumber Co Dequeen Arkansas stop Wire whether freight charges were paid by Domestic Coke Corp Fairmont W Va and whether inspection was allowed stop Shippers are willing to dispose car for freight charges to anyone interested

"Chicago Wood Products Inc.

which telegram was received by plaintiff at Baltimore, Maryland, on January 31, 1931.

"9. On January 31, 1931, defendant sent a * * * telegram to plaintiff at Baltimore, Maryland, * * * as follows:

"Chicago Ill Jan 31 1931 12:28 PM
"C C Glessner, GFCA B&O RR Co
"Baltimore Md
"Retel Erie 68105 car sold to Domestic Coke Corp Fairmont Forty-one Thousand One Hundred pounds at Fourteen Dollars Fifty Cents per ton or $297.97 stop Freight rate Forty-eight Cents or $197.28 Wire quick as consignee will not accept at any price stop We have authority from shippers to sell for freight for whatever can be salvaged.

"Chicago Wood Products Inc.

which telegram was received by plaintiff at Baltimore, Maryland, on said date.

"5. Said sec operations could advantage carried at Baltimore, that Virginia, on January 27, 1921, at which time plaintiff placed said sec upon the track of the Lancaster Cole Corporation, which corporation refused to accept said shipment.

"6. Thereupon plaintiff sent a * * * telegram to defendant at Chicago, Illinois, in care of Thomas C Palmer

"Baltimore, Md Jan 30 1921 11:00 am
"Chicago Ward Terminal Co
"Chicago Ill

"Shipment just finished six eight ten five Sterling consigned to you for delivery to Lancaster Cole Corp refused account quality fault stating where

"C G Clemmer
"Sales

which telegram was received by defendant on the same day.

"7. That C. C. Clemmer is the General Freight Claim Agent of plaintiff company in Baltimore, Maryland.

"8. In the above quoted telegram delivered on January 30, 1921, made reply in a * * * telegram * * * as follows:

"Chicago Ill Jan 30 1921 9:40 am

"C G Clemmer, 1001 N and O Sts.

"Refer your cable quality shipments from Lancaster to Delaware Ohio. Five shipments Virginia stations were paid by Lancaster Cole Corp Shipment 7 is sent direct Independence and allowed stop Cabinets are utilized to dispose our for five light shipments to anyone interested

"Chicago Ward Terminals Inc.

which telegram was received by plaintiff at Baltimore, Maryland, on January 31, 1921.

"9. On January 31, 1921, defendant sent a * * * telegram to plaintiff at Baltimore, Maryland, * * * as follows:

"Chicago Ill Jan 31 1921 12:00 Nn

"C G Clemmer, 1001 N O St

"Baltimore Md

"Refer Cole 42025 can sell in Lancaster Cole Corp Delaware Sterling-one Thousand for Sterling pounds at Northern Dollars Sixty cents per ton or $197.97 stop Freight rate Sterling-eight cents or $197.88 value quick as demurrage will not accept at any price stop. Is here unless notify from delivery to sell for freight for whatever can be salvaged.

"Chicago Ward Terminals Inc.

which telegram was received by plaintiff at Baltimore, Maryland, on same date.

"10. On February 2, 1931, plaintiff sent a * * * telegram to defendant * * * as follows:

"Baltimore Md Feb 2 1931 10:15 AM
"Chicago Wood Products Inc
"Chicago Ill

"Yours thirty-first Erie six eight ten five Shavings and sawdust Fairmont Positively refused by consignee Must have definite instructions on or before Thursday February fifth or must dispose of for account whom concerned and must look to owner for any deficit Furnish definite disposal orders
"C C Glessner
"Bando

which telegram was received by defendant at Chicago, Illinois, on said date.

"11. On February 2, 1931, defendant sent a * * * telegram to plaintiff at Baltimore, Maryland, * * * as follows:

"Chicago Ill Feb 2 1931 9:38 AM

"C C Glessner
"G.F.C.A Baltimore and Ohio R R Co

"Retal Erie six eight one naught five we advised A. E. Hermanson Chief Clerk J. C. Kimes GFA Bando Chicago on January thirtieth that unless shipping instructions are furnished by shippers namely Home Lumber Company De Queen Arkansas on or before ten o'clock AM Eastern standard time Saturday January thirty-first <u>to dump the car immediately if we are in any way involved in this car</u> Stop We will not be responsible for demurrage charges after January thirty-first. Wire.

(Italics ours) "Chicago Wood Products Inc.

which telegram was received by plaintiff * * * on said date.

"12. The defendant did on January 30 or 31, 1931, advise A. E. Hermanson, who is the Chief Clerk of the General Freight Agent of plaintiff company at Chicago, Illinois, the facts as set forth in the first above telegram.

"13. On February 4, 1931, defendant sent a * * * telegram to plaintiff at Baltimore, Maryland, * * * as follows:

"Chicago Ill Feb 4 1931 1:48 PM
" C C Glessner GFCA
"B and O RR Co

"Retel second Erie six eight ten five Fairmont W Va wire answer our wire second Urgent
"Chicago Wood Products Inc.

which telegram was received by plaintiff at Baltimore, Maryland on said date.

"14. To the above telegram plaintiff on February 5, 1931, made reply by * * * telegram * * * as follows:

"No. 1. On February 14, 1921, telegraphed same to * * * as follows:

"Chicago Feed Products Inc
"Chicago Ill.

"Have ninety-five file six eight two five Dorsings and another Kinsman Tractorpulp returned by mistake. Have been during telegraphic on or before Thursday February 17th on account of the storms. Please and just to send for any circuit Burton Celerity shipment before

"O.D Clemmer
"Manager

which telegram was received by defendant at Cincinnati, Ohio, said date.

"No. 2. On February 15, 1921, defendant sent a * * * telegram to plaintiff at Cincinnati, Ohio, * * * as follows:

"Chicago Ill Feb 2 1921 Price 40

"O.D Clemmer
"O.V.C.A. Manifestos and Cable 2 D Co

"Total file six eight one seven five or original in 3. Kinsmans Quiet Chain 4, 5. Among all Bonds Clamps on Tomorrow Shirlwin that which obligated Instructions are Irrelevant by shipping remedy Home Cables Company Is Long Strangers on or before ten o'clock in order shipment Pine Hardway Journey Ship-Cities to Home the our Immediately. If or pin in by our Carriers in file by Long. Is will not be responsible for Conversion Shipping After Tomorrow ship-first. Burr.

(Sealing cure) "Chicago Food Products Inc.

which telegram was received by plaintiff * * * on said date.

"No. 3. The defendant did on January 20, or 21, 1921, write to a Commerce, the in the United Clerk at the Shortal Freight Depot of plaintiff company at Chicago, Illinois, the Fruit it was Perm in the Five above telegram.

"No. 4. On February 16, 1921, defendant sent a * * * telegram to plaintiff at Cincinnati, Ohio, * * * as follows:

"Chicago Ill. Feb 6 1921 Price 40

" O.D Clemmer Sales
"O and O Co do

"Total second file six eight two five Kinsmans 7 Ok also answer our wire second Urgent.

"Chicago Food Products Inc.

which telegram was received by plaintiff at Cincinnati, Ohio, said date.

"No. 5. To the above telegram plaintiff on February 5, 1921, made reply by * * * telegram * * * as follows:

"Baltimore Md Feb 5 1931 11:15 AM
"Chicago Wood Products Inc
"Chicago Ill

"Your wire fourth Erie six eight ten five Have instructed our representative if possible to sell and if unable sell to dump Will advise you further

"C C Glessner
"Bando

which telegram was received by defendant at Chicago, Illinois on said date.

"15. That the word 'Betel' at the beginning of the above quoted telegram is a code word meaning 'In regard to telegram.'

"16. That plaintiff sent a representative to Fairmont, West Virginia, on or about February 6, 1931, for the purpose of disposing of said carload of shavings, and the best offer he could obtain for same was from one J. Ferione, of Fairmont, West Virginia, who offered $7.60 for same, and said shavings were accordingly sold to John Ferione for $7.60.

"17. That the proper and lawful charges according to the tariffs on file with the Interstate Commerce Commission for the transportation of said shipment from De Queen, Arkansas, to Fairmont, West Virginia, at the time said shipment moved was $197.28, and that demurrage charges of $4.00 accrued on said car while it was awaiting orders from the defendant for its disposition.

"18. The said bill of lading issued by the Kansas City Southern Railway Company for the carload of shavings on January 31, 1931, at De Queen, Arkansas, contains a condition in words and figures as follows:

"'Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within fifteen (15) days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed as the case may be, and that it will be subject to sale under the terms of the bill of lading, if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipper order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent or given.' (Italics ours.)

"19. That said sawdust or shavings transported under the abovementioned bill of lading was non-perishable property, and plaintiff did not sell same at public auction to the highest bidder at a place designated by it, nor did it publish a notice containing a description of the property, name of the party to whom consigned,

"Telegram No. [illegible] Feb 6 1943 11:15 am
"Chicago Wood Products Inc
"Chicago Ill

"Your wire fourth Feb six eight ten fifty five instructed war preferentialities if possible be sent and if months will be done Will advise you further

"S G Chandler
Tokyo"

which telegram was received by Takamura at Chicago, Illinois on said date.

"16. That the word 'Tokyo' at the beginning of the above quoted telegram is a code word meaning 'in regard to telegram.'

"18. That plaintiff sent a representative to Kimmel, Vigil Kimmel, co as about February 6, 1943, for the purpose of disposing of said surplus of shovelings, and the best offer he could obtain for same was from one G. Verdone, of Natomas, Yuba City, who offered $7.00 for same, and said shovelings were accordingly sold to John Verdone for $7.00.

"17. That the proper and lawful charges according to the tariffs on file with the Interstate Commerce Commission for the transportation of said shovels from Yuba City, Natomas, to Kimmel, Vigil Kimmel, at the time said shipment moved was $247.18, and that demurrage charges of $4.00 accrued on said car while it was holding motors from the defendant for its disposition.

"18. The bill of lading issued by the Yuba City Southern Railway Company for the contract of shovelings on January 24, 1943, at the Gaston, Arkansas, contains a condition in words and figures as follows:

"'Where nonperishable property which has been transported in drayage or transfer is released by consignee to the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within fifteen (15) days after notice of arrival has been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier. Provided, that the carrier shall have first mailed, sent, or given to the consignee notice that the property has been released or tendered to the same party, and when so sold the carrier shall be entitled to deduct the amount of the bill of lading, if charges have not already been paid, and shall have published notice indicating a description of the property, the name of the party to whom consigned, or, if shipped upon multiple, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks in a newspaper of general circulation in the place of sale or nearest place where such newspaper is published. Provided, that no duty shall have elapsed before publication of notice of such sale and notice that the property was released or tendered, mailed, sent or given.' (Italics ours.)

"19. That such sections of shovelings transported under the above-mentioned bill of lading were non-perishable property, and plaintiff did not sell same at public auction to the highest bidder, at place designated by it, nor did it publish a notice containing a description of the property, name of the party to whom consigned,

or the name of the party to be notified, nor the time and place of sale once a week for two successive weeks in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published.

"20. That said bill of lading, including the condition thereof set forth in Paragraph 18 hereof, was in form filed with and approved by the Interstate Commerce Commission, and was the form of bill of lading applicable in connection with the tariff rate that was properly charged for the transportation of said carload of shavings or sawdust.

" * * *

"22. It is further stipulated and agreed that in the event the Court finds the issues for plaintiff, that it shall assess the damages for plaintiff against defendant in the sum of $193.68, which amount represents freight charges of $197.28, demurrage charges of $4.00 and a credit to the defendant of $7.60, being the amount realized at the sale of said shavings or sawdust."

The defendant contends "that the plaintiff violated the terms and provisions of the contract or bill of lading in selling the shipment at private sale instead of at auction to the highest bidder and in selling the shipment without publication, all as required by the bill of lading; and that by so doing plaintiff breached its contract of carriage and therefore can recover nothing; and that by reason of such sale contrary to the terms of the bill of lading the defendant lost its property which was of the value of an amount in excess of the amount sued for; and that the trial court should have found the issues for the defendant." In support of the contention defendant argues that "the defendant did not authorize a private sale of the shipment, nor did the plaintiff (defendant) authorize any disposition thereof other than as provided in the bill of lading," and "the term 'dump' means nothing more than to empty."

Defendant further argues that "section 18 of the contract or bill of lading, prepared and issued by the plaintiff, provided the only method of disposing of non-perishable property in the event that the consignee refused to accept and that method was to sell the shipment at public auction to the highest and best bidder, after the carrier shall have first published notice containing a

or the owner of the property to be partition, can only take and place of sale upon a work for the successive years in a manner of general circulation in the place of sale or other local place where such employer is published.

"20. That such act of taking, including the execution thereof and facts in connection as herein, may in fact exist with and approved by the Indianola Commerce Commission, and was the form of bill of lading applicable in accordance with the serial rate that was properly charged for the transportation of said cattle of divisions or another.

* * * *

"23. In the further stipulated and agreed that in the event the court finds the issues for plaintiff, that it shall assess the damages for plaintiff against defendant in the sum of $1000, which amount represents fairly damages of $100, demurrage charges or other and a proper to the extension of time, being amounts realized in the sale of said cattle as aforesaid."

The Colorado decision "that the plaintiff violated the terms and provisions of the contract or bill of lading in selling the shipment at private sale instead of at auction in the Denver yards and in selling the shipment without obtaining permission, all as required by the bill of lading and that by so doing plaintiff breached its contract of carriage and therefore can recover nothing; and that by reason of such sale contrary to the terms of the bill of lading the defendant lost its property which was of the value of an amount in excess of the amount sue-for (?) and that the latter court should have found the issues for the defendant." In support of the appellee defendant argues that "the defendant did not violate a private sale of the shipment, nor did the plaintiff (defendant) authorize any disposition thereof other than as provided in the bill of lading," and "the term 'damp' means nothing more than in reply."

Defendant further argues that "section 14 of the standard or bill of lading, prepared and issued by the plaintiff, provided the only method of disposal of non-perishable property in the event that the consignee returns to market and not without the bill the shipment of public auction to the highest and best bidder, after the carrier shall have first published notice stating a

description of the property, the name of the party to whom consigned and the time and place of sale, once a week for two successive weeks in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published;" that "instead of complying with this provision the plaintiff * * * sold at private sale for the nominal sum of $7.60. By this failure to perform according to the bill of lading and by the sale in violation of the contract terms the plaintiff violated its contract, causing the loss of the shipment to the defendant, and, not having performed the contract and having violated its terms, the plaintiff cannot recover." Section 18 of the bill of lading, upon which the defense is based, provides that the method of sale therein stated is to be followed by the carrier "if disposition be not arranged for." After a careful consideration of the stipulated facts we have reached the conclusion that the trial court was justified in finding that the defendant waived the method of sale as provided in the bill of lading. From the telegrams sent by defendant it is evident that it was anxious to avoid the expenses incident to a sale under the bill of lading. When its telegram of February 2 is read in the light of the other telegrams in evidence it is perfectly evident that the attitude of the defendant at that time was that the plaintiff should get rid of the shipment immediately so that the defendant might not be held responsible for further expenses. The plaintiff, after receiving that telegram, wired the defendant: "Have instructed our representative if possible to sell and if unable to sell, to dump." This telegram indicated plainly that the plaintiff understood from defendant's telegram of February 2 that the latter did not desire the method of sale prescribed by the bill of lading to be followed, yet the defendant failed to answer plaintiff's last telegram, and there is much force in the contention of the

[illegible] of the property, the sum of the money in them exclusive and the time and place of sale, and a notice for its advertisement in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published." that "instead of complying with this provision the defendant [illegible] sale at private sale for the nominal sum of $7,000." By this failure to perform according to the bill of lading and by the sale in violation of the contract being the plaintiff alleged in, summary, causing the loss of the shipment in the aforesaid, and, not having performed the conditions and having violated the terms, the plaintiff thereby "[illegible] the bill of lading, upon which the defendant is bound, provides that the method of sale therein stated is to be followed by the carrier "if disposition be not arranged for." After a careful consideration of the pleadings facts we have stated the conclusion that the trial court was justified in finding that the defendant [illegible] the method of sale as provided in the bill of lading. From the judgment such by defendant it is evident that it was anxious to avoid the expense incident to a sale under the bill of lading. Upon its judgment of February 8 is read in the light of the other judgments in evidence it is practically evident that the attitude of the defendant at this time was that the plaintiff should get rid of the shipment immediately so that the defendant might not be held responsible for further expenses. The plaintiff, after stipulating that defendant, acted the attorney, "Had instructed our representative if possible to sell and if unable to sell, to dump." This judgment indicated plainly that the plaintiff understood from defendant's judgment of February 2 that the defendant did not desire the method of sale prescribed by the bill of lading to be followed, yet the attempted failure to comply plaintiff's last judgment, and there is much force in the contention of the

plaintiff that the present position of the defendant is an afterthought. If the defendant intended by its telegram, as it now insists, to have the plaintiff dispose of the property under the terms of the bill of lading, it would not have sent the telegram of February 2.

We are satisfied that the judgment of the Municipal court of Chicago is a just one, under the stipulated facts, and it is accordingly affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

36528

127 H

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

v.

DIVISION STATE BANK, a Corporation, et al.

C. W. DAVENPORT, Receiver, (Respondent) Appellant,

WILLIAM F. DUHA, (Intervening Petitioner) Appellee.

APPEAL FROM CIRCUIT OF COOK COUNTY.

272 I.A. 623

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal is brought by C. W. Davenport, Receiver, to review an order directing him to pay to William F. Duha, as executor of the estate of Marie A. Duha, intervening petitioner, the sum of $720.99 as a preferred claim.

A bill was filed by the Auditor of Public Accounts of Illinois against Division State Bank to dissolve the bank. It alleged, inter alia, that he had determined that the bank was operating with an insufficient proportion of its assets in cash and convertible securities and that the business of the bank was being conducted in an unsafe manner, and that therefore he had assumed control of the bank and had appointed appellant receiver of it. Thereafter the intervening petitioner was allowed to file his verified petition, in which he alleges that on August 6, 1931, he was appointed executor of the estate of Marie A. Duha; that

" * * * in the course of the administration of his Estate, he had collected various moneys and made various expenditures; that at the time of his appointment, he opened a checking

account in the Division State Bank, a corporation, as Executor under said Estate, and at said time was informed by the trust officer of said Bank that the said funds were trust funds; that your petitioner had no personal interest in the said fund other than that as Executor; that in addition to the said fund, your petitioner had on deposit with the Bank various bonds belonging to the said Estate.

"Your Petitioner further represents that all moneys received and credited to said account are Estate funds and all charges or withdrawals from the said fund are expenditures made under said Estate, and that there is now a balance in said account in the sum of $720.99.

" * * *

"Your Petitioner further represents that the said Estate is to be closed on August 6th, 1932, and that thereupon your petitioner will be called upon to make distribution of said funds.

"Your Petitioner further represents that he had been informed by the said Receiver that the said account was not carried on the books of the bank as trust funds.

"Your Petitioner Therefore Prays that an order may be entered herein directing the said Receiver of said Division State Bank, a corporation, to pay the same unto your petitioner as a preferred claim, constituting trust funds."

The respondent filed no motion nor plea testing the sufficiency of the petition. The answer of appellant neither admits nor denies the allegations in the petition, but demands strict proof thereof, and further states "that the records of the defunct bank indicate that William F. Duha had a checking account with the said bank under the style of 'Wm. F. Duha,' with no indication on said account that it was the account of an executor." It will be noted that the answer does not affirmatively deny that the funds in question were trust funds. The decree entered in the matter of the petition is as follows:

"This Matter coming on to be heard upon the verified petition of William F. Duha, Executor of the Estate of Marie A. Duha, deceased, for a rule upon C. W. Davenport, as Receiver of Division State Bank, a corporation, to pay unto the said William F. Duha, Executor of the Estate of Marie A. Duha, deceased, as a preferred claim, the sum of $720.99 being moneys on deposit in the Division State Bank, a corporation, belonging to the said William F. Duha, as Executor of the Estate of Marie A. Duha, deceased, and the answer to said petition of C. W. Davenport, as Receiver of the Division State Bank, a corporation, and the court having heard evidence in support of said petition, and it appearing to the court that all parties are present before the court, and the court being fully advised in the premises, finds: That the

account in the Division Book Club, a corporation, on December
which said Edwin, and at which time was informed by the trust
officer of said Bank that the said funds were first thought that
your petitioner had an personal interest in the said fund since than
that on December that in matters in the said fund, your
petitioner had an dispute with the Book Keeper Jonas Schlenker
in the said Bank.

Your Petitioner further represents that all money
received and credited to said account for Robert Jones and all
charges and withdrawals from the said fund are supposedly some
under said Jones, and that there is now a balance in said account
of the sum of $750.00.

* * *

Your Petitioner further represents that the said Bank
is to be closed on August 8th, 1930, and that unless your
petitioner will be called upon to make distribution of said funds,
your petitioner will be called upon to make distribution of said funds.

Your Petitioner further represents that he has been informed
by the said Jonathan that the said account was not carried on
the books of the Bank as trust funds.

Your Petitioner therefore fears that an order may be
entered herein directing the said Jonathan of said Division Book
Club, a corporation, to pay the same into your petitioner as a
personal claim, contrary to the rights of said petitioner.

The respondent filed no motion nor plea testing the sufficiency of
the petition. The answer of respondent neither admits nor denies
the allegations in the petition, but demurrer alleges proper therein,
and further states "that the records of the defendant Bank indicate
that William T. John had a checking account with the said Bank under
the style of "Mr. T. John," with no indication on the account that
it was the account of an executor." It will be noted that the
answer does not affirmatively deny that the funds in question were
trust funds. The answer omitted in the matter of the petition is
as follows:

"Said Petitioner wishes to be heard upon the validity
petition of William T. John, Executor of the Estate of Doris J.
Jones, deceased, for a rule upon ... Respondent, as Executor of
William Trade Bank, a corporation, to pay into the said William
T. John, Executor of the Estate of Doris J. Jones, deceased, as
a personal claim, the sum of $750.00 being money, or credit in
the Division Book Bank, a corporation, belonging to the said
William T. John, as Executor of the Estate of Doris J. Jones, de-
ceased, and the answer to said petition of ... Respondent, as
Executor of the Division Book Bank, a corporation, and the motion
having heard evidence in support of said petition, and it appearing
to the court that all parties are present before the court, and
the court, being fully advised in the premises, finds that the

claim of William F. Duha as Executor of the Estate of Marie A. Duha, deceased against the Division State Bank, a corporation, in the amount of $720.99 is a preferred claim, and

"It Is Therefore Ordered that C. W. Davenport, as Receiver of the Division State Bank, a corporation, pay unto William F. Duha, as Executor of the Estate of Marie A. Duha, deceased, or to Meyer W. Gesin, his solicitor, the sum of $720.99 as a preferred claim to be paid in due course of administration."

No certificate of evidence was filed in the cause.

The following are the only points made by appellant in his original brief:

1. "Bank deposits are either general or special."

2. "A general deposit is not entitled to a preference."

3. "A deposit is presumed to be general."

4. "The deposit of a fund by a fiduciary does not <u>ipso facto</u> create a special deposit."

5. "A deposit of funds belonging to an estate does not make it a special one, even though the funds are known by the bank to be trust funds."

6. "Character of deposit is to be determined by contract made between depositor and bank."

7. "The making of secret agreements for the benefit or protection of one depositor is absolutely void and of no effect."

8. "The deposit in question was a general one and is therefore not entitled to a preference."

All of these points are such as might be made in a case where the evidence was preserved by a certificate of evidence, but none can be determined upon the common law record in the instant appeal. In the reply brief the appellant states the well known rule that in chancery it is incumbent upon the party seeking to sustain a decree in his favor based on evidence, to preserve the evidence in the record in some proper form or to have incorporated in the decree findings of fact upon which the decree is based, and the appellant there contends, for the first time, "that the decree of the court holding the claim of the petitioner to be a preference is a conclusion of law; that said decree recites no finding of

Claim of William V. Cobb, the Executor of the Estate of Elmer G. Cobb, claiming against the Virginia State Bank, a corporation, in the amount of $700.00 is specifically claimed and

"It is therefore Ordered that the Commonwealth, as creditor of the Virginia State Bank, a corporation, pay unto William V. Cobb, as Executor of the Estate of Elmer G. Cobb, deceased, as in Order V, weeks, his solicitor, the sum of $700.00 as a preferred claim to be paid in the course of administration."

In affirming or reversing one finds in the answer

The following are the only points made by appellant

in his original brief:

1. "Claims originally are claims against or against."

2. "A general deposit in our opinion is a preference."

3. "A deposit is presumed to be general."

4. "The deposit of a fund by a fiduciary does not imply trust made it a special deposit."

5. "A deposit of funds belonging to an entity does not make it a special deposit, even though the funds are known by the bank to be trust funds."

6. "Commingling of deposits is to be determined by material made between depositor and bank."

7. "The making of general arrangements for the benefit or protection of the depositor is absolutely void and of no effect."

8. "The deposit in question was a general one and is therefore not preferred in a preference."

All of these points are such as might be made in a case where the evidence was preserved by a certificate of evidence, but upon our examination upon the common law record in the instant appeal, in the reply brief the appellant states the well known rule that in absence of it is incumbent upon the party seeking to justify a finding in his favor based on evidence, to present the evidence in the record in some proper form or to have incorporated in the bill of exceptions of fact upon which the decree is based, and the appellant then analyzes the file thus, "that the decree of the court holding the claim of the petitioner to be a preference is a conclusion of law that will receive review on transcript of

fact justifying such conclusion, and that the record contains no facts to support the conclusion," and that, therefore, the decree must be reversed. For the purposes of this appeal we may concede that the criticism of the decree is justified, but rule 19 of this court provides that no point not made in the original brief "shall be raised afterwards either in oral or printed argument or by reply brief or on petition for rehearing," and we know of no good reason why this rule should not be enforced in the instant case.

The decree of the Circuit court of Cook county will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

128 H

36529

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. OSCAR NELSON, Auditor of Public Accounts of the State of Illinois,

v.

DIVISION STATE BANK, a corporation et al.

C. W. DAVENPORT, Receiver, (Respondent) Appellant,

PHILIP PLONSKY, (Intervening Petitioner) Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

272 I.A. 623[4]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal is brought by C. W. Davenport, receiver, to review an order directing him to pay to P. Plonsky, as receiver, intervening petitioner, the sum of $687.87 as a preferred claim.

A bill was filed by the Auditor of Public Accounts of Illinois against Division State Bank to dissolve the bank. It alleged, inter alia, that he had determined that the bank was operating with an insufficient portion of its assets in cash and convertible securities and that the business of the bank was being conducted in an unsafe manner, and that therefore he had assumed control of the bank and had appointed appellant receiver of it. Thereafter the intervening petitioner was allowed to file his verified petition, in which he alleges that on June 11, 1931, he was appointed receiver in the case of Chicago Title & Trust Company, a corporation, as successor, v. Yetta Gottschalk et al., in the Superior court of Cook county, and that he had qualified and

[illegible]

[illegible]

[illegible]

was acting as such receiver. The petition then alleges:

"Your Petitioner further represents that as such Receiver he had collected from the said premises, various moneys which he had deposited in the Division State Bank, a corporation, under a checking account in the name of P. Plonsky, as Receiver.

"Your Petitioner further represents that he now has a balance on said receivership account in the sum of $687.87.

"Your Petitioner further represents that the said Division State Bank, a corporation, on to-wit: the 16th day of June, 1932, ceased functioning as a banking institution and that thereafter one C. W. Davenport was duly appointed Receiver of said Division State Bank, a corporation.

"Your Petitioner further represents that he has no personal interest of any kind nature or description in said fund except as that of Receiver, and that the said account in the Division State Bank, a corporation, of which the said C. W. Davenport is Receiver, constitute a preferred claim, and your petitioner therefore prays that an order may be entered herein directing C. W. Davenport as Receiver, to pay unto your petitioner the said sum of $687.87 now on deposit in said Division State Bank, a corporation, under the account of P. Plonsky as Receiver."

The respondent filed no motion nor plea testing the sufficiency of the petition. The answer of the receiver states:

"This respondent admits the allegations contained in the first and second paragraphs of said petition.

"This respondent denies the allegations contained in the third paragraph of said petition that there is a balance on said receivership account in the sum of $687.87 and states that the balance on said receivership account is the sum of $662.87.

"This respondent admits the allegations contained in the fourth paragraph of said petition.

"This respondent further answering denies that said sum of $662.87 as aforesaid, is a fund separate and apart from other accounts of Division State Bank, and denies that said sum is in trust in favor of the above petitioner, and denies that said petitioner is entitled to receive from your respondent said amount in full."

The decree entered in the matter of the petition is as follows:

"This matter coming on to be heard upon the verified petition of Philip Plonsky for a rule upon C. W. Davenport, as Receiver of Division State Bank, a corporation, to pay unto the said Philip Plonsky as a preferred claim, the sum of $687.87 being moneys on deposit in the Division State Bank, a corporation, belonging to the said Philip Plonsky, as Receiver, and the answer to said petition of C. W. Davenport as Receiver of the Division State Bank, a corporation, and the court having heard evidence in support of said petition, and it appearing to the court that all parties are present before the court, and the court being fully advised in the premises, finds:

was acting as such receiver. The petition then alleges:

"Your Petitioner further represents that on such receiver as had collected from the said premises various sums which he had expended in the ordinary course of a corporation, under a specially assumed account in the name of "L. Hardy, as Receiver".

"Your Petitioner further represents that he has been a bidder at said proceedings because in the year of 1927.27.

"Your Petitioner further represents that the said Virginia Park, a corporation, on or about the 12th day of June, 1928, became insolvent as a banking institution and that Petitioner was at the instance of said duly appointed receiver of said Virginia Park, a corporation.

"Your Petitioner further represents that he has no personal interest of any kind nature or description in said Park Avenue as stock of Receiver, and that the said amount in the Petition herein made, or expenditure, of which the said is a creditor as Receiver, constitute a preferred claim, and your Petitioner therefore prays that an order may be entered herein directing the Receiver to immediately pay unto your Petitioner the said sum of 1927.27 now expended in said Virginia Park Hotel, a corporation, under the account of "L. Hardy as Receiver".

The respondent filed an answer and plea denying the sufficiency of the petition. The answer of the receiver states:

"This respondent admits the allegations contained in the first and second paragraphs of said petition.

"This respondent denies the allegations contained in the third paragraph of said petition that there is a balance on said receivership account in the sum of 1927.27 and states that the balance on said receivership account is the sum of 1925.27.

"This respondent admits the allegations contained in the fourth paragraph of said petition.

"This respondent further admits that said sum of 1925.27 as aforesaid, is a true expenditure and credit from other accounts of Virginia Park Hotel, and denies that said sum is in fact in the form of the above petitioner, and denies that said petitioner is entitled to priority from your respondent and pleads in full."

The above answer is the matter of the petition in intervention.

"This petition seeks to be heard upon the verified petition of Julia Hardy for a rule upon L. V. Livingston, as Receiver of Virginia Park Hotel, a corporation, to pay unto the said Julia Hardy as a preferred claim, the sum of 1927.27 being amount so expended in the Virginia Park Hotel, a corporation, and the said Julia Hardy, as a creditor of the Receiver of the Virginia Park Hotel, a corporation, and the court having heard evidence in support of said petition, and it appearing to the court that all parties are present before the court, and the court being fully advised in the premises, finds:

"That the claim of Philip Flonsky, as Receiver, against the Division State Bank, a corporation, in the amount of $687.87 is a preferred claim, and

"It Is Therefore Ordered that C. F. Davenport, as Receiver of Division State Bank, a corporation, pay unto Philip Flonsky, as Receiver or to Meyer E. Rosin, his solicitor, the sum of $687.87 as a preferred claim to be paid in due course of administration."

No certificate of evidence was filed in this cause.

The following are the only points made by the appellant in his original brief:

1. "Bank deposits are either general or special."

2. "A general deposit is not entitled to a preference."

3. "A deposit is presumed to be general."

4. "The deposit of a fund by a fiduciary does not <u>ipso facto</u> create a special deposit."

5. "A deposit of funds belonging to an estate does not make it a special one, even though the funds are known by the bank to be trust funds."

6. "Character of deposit is to be determined by contract made between depositor and bank."

7. "An affix to the name in which an account is carried indicating that the account is that of a fiduciary does not render the account a special one."

8. "The making of secret agreements for the benefit or protection of one depositor is absolutely void and of no effect."

9. "The deposit in question was a general one and is therefore not entitled to a preference."

10. "The court erred in decreeing the claim of the intervening petitioner to be the sum of $687.87."

All of these points save the last, which will be specially referred to hereafter, are such as might be made in a case where the evidence was preserved by a certificate of evidence, but it is plain that none can be determined upon the common law record in the instant appeal. In the reply brief the appellant states the well known rule that in chancery it is incumbent upon the party seeking to sustain a decree in his favor based on evidence, to preserve the evidence in the record in some proper form or to have incorporated in the decree findings of fact upon which the decree is based, and the appellant there

contends, for the first time, that the decree of the court holding the claim of the petitioner to be a preferred one is a conclusion of law and that the decree recites no finding of fact justifying such a conclusion, and that therefore the decree must be reversed. For the purposes of this appeal we may concede that the criticism of the decree is justified, but rule 19 of this court provides that no point not made in the original brief "shall be raised afterwards either in oral or printed argument or by reply brief or on petition for rehearing," and we know of no good reason why this rule should not be enforced in the instant case.

As to point ten, the appellant states:

"The order of Court appealed from directed the appellant to pay to the petitioner the sum of $687.87. This was the amount alleged by the intervening petitioner to be owing to him. The appellant's answer to said petition, however, expressly denied that this was the correct amount and expressly alleged that the balance in said account was $662.87. There was no replication filed by the petitioner to the answer of appellant. It is the contention of the appellant that the petitioner's failure to file a replication to appellant's answer and the submission of the cause for hearing on the petition and answer automatically operated to cause the appellant's answer to be taken as true."

And the appellant contends that the court, in the state of the pleadings, erred in allowing the claim in the sum of $687.87 instead of $662.87. It is sufficient to say, in answer to this contention, that the mere want of a replication is not a sufficient cause for reversing a decree, where the parties have submitted the case for decision upon pleadings and proof, and the court heard proof without objection, as in such case the filing of a replication will be deemed to have been waived. (See Jones v. Neely, 72 Ill. 449.) In Marple v. Scott, 41 Ill. 50, 61, the court said:

"It would have been undoubtedly proper and in strict accordance with the statute so to have set down this case, had not the defendants treated the cause as at issue, and joined in taking the depositions of the several witnesses, and consenting to set down the cause for hearing on bill, answer, exhibit and depositions. To this they have assented, and cannot now invoke this statute in their favor."

(See Stark v. Millibert, 19 Ill. 343; Webb v. Alton Marine and Fire

Certainly, for the first time, that the receipt of the money building the minds of the politicians is be a punishment and is a conclusion of fact and that the courts provide no finding of fact justifying such a conclusion, and that therefore the proceeds must be returned. For the purposes of this appeal we may assume that the criticism of the answer is justified, but only in of this court pronounce that the point not made in the original brief "should be raised differently either in oral or printed argument or by reply brief or on petition for rehearing," and we know of no good reason why this rule should not be enforced in the instant case.

As to point two, the appellant argues:

"The minor of legal accounts from Exhibits 1 the appellant is not in the position to the year of 1947-48. This was the amount allocated by the Interventing politicians to be used in 1948. The appellant's counsel to will politicians, therefore, expressly stated that this was the receipts income, and expressly stated that the income in 1948 amount was 1947-48. There was no stipulation filed by the politicians to the amount of expenditure. It is the contention of the appellant that the politicians's failure to file a stipulation in appellant's answer and the admission of the amount for receipts in the pleadings had caused automatically operative in order the appellant's answer to be taken as true."

And the appellant contends that the court, in the light of the pleadings, erred in allowing the claim in the amount of $1947.07 instead of $1000.07. It is sufficient to say, in answer to this contention, that the mere fact of a stipulation in not a sufficient cause for reversing a decree, where the proofs are conclusive the case for decision upon pleadings and proofs, and the court based proof without objection, as in such case the filing of a stipulation will be deemed to have been waived. (see Jones v. Hooks, 71 Ill. 419.) In Burke v. Davis, 61 Ill. 80, 82, the court said:

"It would have been unnecessarily onerous and in order according with the rights of to have and that this court, and not the chancellor, should the order as it seems, and jurors in taking the stipulations of the several attorneys, and considering it and then the order for decision on bill, answer, exhibit and stipulations, in this they have acquiesced, and cannot now invoke this rule, waive in their favor."

(See Ibid v. Hillsboro, 12 Ill. 248; Jones v. Alton Judge and Pier

Ins. Co., 5 Gilm. 223; Jameson v. Conway, id. 327; Piot v. Davis, 241 Ill. 434, 439.)

The decree of the Circuit court of Cook county will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

129 A

36637

MARCELLA FRICOT,
Plaintiff,

v.

DANIEL BRADY,
Defendant.

F. L. McARDLE,
(Petitioner) Defendant in Error,

DANIEL BRADY,
(Respondent) Plaintiff in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

272 I.A. 624

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the suit of Marcella Fricot v. Daniel Brady, F. L. McArdle (hereinafter called petitioner) filed his amended petition to adjudicate attorney's fees and enforce lien under the statute. It was heard by the court and there was a finding in favor of the petitioner for $1,083.33. Judgment was entered on the finding and Daniel Brady, the respondent, has sued out this writ of error.

The amended petition alleges that the petitioner is an attorney at law; that on August 3, 1930, Marcella Fricot met with an accident, while riding in an automobile, through the negligence of Daniel Brady, who was driving the automobile; that said Fricot, on December 16, 1930, employed petitioner, under a contract in writing, to take charge of her claim for damages for said injuries, to negotiate settlement, bring suit, and do all things necessary for the protection of her rights in the premises; that she agreed, in and by said con-

[illegible]

[illegible]

[illegible]

v.

[illegible]

[illegible]

[illegible]

tract, to pay petitioner for services as attorney a sum equal to one-third of any amount that might be recovered; that petitioner accepted said employment upon the terms and conditions stated in the contract and immediately entered upon the performance of his duties, caused a thorough investigation to be made of the circumstances of the accident, made necessary preparation to present to the court the medical aspect of her case and caused witnesses to be interviewed; that said Fricot professed to have no funds to start suit and therefore petitioner prepared the necessary papers to start suit on her behalf as a poor person; that he examined the law in the case and prepared the praecipe and summons and drafted the declaration; that he made appointments with the plaintiff to come to petitioner's office to sign the necessary papers, and has been at all times ready, willing and able to properly proceed with the prosecution of the suit; that after the making of the contract and about December 17, 1930, petitioner caused a notice in writing of attorney's lien to be served on Daniel Brady; (here follows a copy of the written notice) that after the service of said notice on Brady a representative of an indemnity company called at petitioner's office for the purpose of negotiating a settlement; that petitioner received an offer of settlement which he rejected because it was inadequate; that after service of said notice on Brady there was commenced (without notice to petitioner), in the Circuit court of Cook county, on April 16, 1931, a suit by said Fricot against said Brady for damages arising out of the accident to her; that on February 2, 1932, said claim was compromised by Brady, or by the insurance company, for the sum of $3,000 or more, and the suit was then dismissed by agreement, and petitioner has been paid no part of the said fee agreed to be paid him, although he has demanded payment of it from Brady, but Brady has refused and still refuses to pay said fee or any part thereof.

The respondent contends that "the judgment is pro forma erroneous and must be reversed." It appears that on February 19, 1932, "the court rendered a finding in favor of petitioner, Patrick L. Mcardle, and against the defendant, Daniel Brady, for $1,083.33," but did not enter a judgment at that time. Subsequently, on October 21, 1932, a judgment was entered upon the finding. At the bottom of the judgment order appears the following: "Nunc pro tunc as of September 19th, 1932." There is not the slightest merit in the instant contention. If a final judgment had been entered at the September term a different situation would have been presented, but the court did not enter judgment at that term and under the statute the cause was continued until the October term, and the court had full power at that term to enter judgment. The fact that the court used the words in question did not affect its right to then enter judgment, and the words relied upon may be treated as mere surplusage. It would be an idle action for us to reverse the case merely to have these words stricken from the judgment order.

The respondent next contends that "the contract between Miss Fricot and petitioner, having been procured by solicitation and misrepresentation, was void." The trial court found that the contract was not procured by solicitation and misrepresentation, and we are in accord with his action in that regard.

The respondent next contends that "the contract between Miss Fricot and petitioner can not be construed as an agreement to pay petitioner thirty-three and one-third percent of any amount recovered after suit filed." The argument of respondent, based upon an unreasonable construction of the contract, is without merit. What we have said of the last contention applies with equal force to the further contention of respondent that petitioner's notice of attorney's lien was good only for the sum of thirty-three and one-third dollars. Nor do we find any merit in the further contention

The prosecution contends that "the judgments in question are void." It argues that in January 23, 1922, "the court rendered a finding in favor of petitioner, Dulcie L. Morris, and against the defendant, Harold Morris, for $1,000.00," but "the clerk entered a judgment in that sum, notwithstanding, on January 23, 1922, a judgment was entered upon the finding. At the bottom of the judgment order appears the following: 'Done pro tunc as of September 1922.' There is not the slightest merit in the instant contention. If a valid judgment had been entered at the original time, a different situation might have prevailed, but the order did not enter judgment at that time and under the circumstances was nothing until the October term, and the court was fully empowered at that time to enter judgment.

The fact that the entry was made in the wrong judgment, and the words relied upon may be treated as mere surplusage. It would be an idle ceremony for us to strike the word "void" as here there were orders from the judgment entry.

The respondent next contends that "the contract between Ellen Morris and petitioner, having been procured by solicitation and misrepresentation, is void." The trial court found that the contract was not procured by solicitation and misrepresentation, and we are in accord with his action in that regard.

The respondent next contends that "the contract between Ellen Morris and petitioner was not in contravention of an agreement to pay petitioner alimony-time- and one-third parent of any amount received after said time." The argument of respondent, based upon an unreasonable construction of the contract, is without merit. That we have said of the last contention applies with equal force to the further contention of respondent that petitioner's waiver of alimony's time was good only for the use of thirty-three and one-third dollars. Nor do we find any merit in the further contention

of the respondent that the contract was abandoned by petitioner.

The final contention of the respondent is that "even if there were a valid contract and Miss Fricot had discharged petitioner without cause, petitioner could recover only on quantum meruit for what he had done." There is no merit in this contention. (See Baker v. Baker, 258 Ill. 418, 421; Standidge v. Chicago Rys. Co., 254 Ill. 524, 536; Sutton v. Chicago Rys. Co., 258 Ill. 551; Tulka v. Chicago City Ry. Co., 259 Ill. App. 234, 238; Freyfuss v. Freud, 209 Ill. App. 345; Caruso v. Felling, 271 Ill. App. 318.) The only Illinois case cited by respondent in support of his contention is Pratt v. Kerns, 123 Ill. App. 86. That decision was rendered before the passage of the Attorney's Lien law of 1909, and it has no application to the instant case. It will be noted that Mr. Justice Vickers, who wrote the opinion in that case, also wrote the opinion in Standidge v. Chicago Rys. Co., supra.

The judgment of the Circuit court of Cook county will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

of the proceedings that the question was abandoned by petitioner.

The final consideration of the proceedings is that "even if there were a valid protest the State Board has discharged petitioner without cause. Petitioner would therefore only be [illegible] for what he had done." There is no merit in this contention. (See Baker v. Baker, 109 Ill. App. 411; Cunningham v. Cunning, 74 Ill. App. 124, 126; Jackson v. Chicago Ice Co., 109 Ill. App. 283; Dunn v. Dunn, 247 Ill. App. 268; Stratton v. Tyson, 88 Ill. App. 268; Gordon v. Collins, 271 Ill. App. 124.) The only illinois case cited by respondent in support of his contention is Cook v. Burke, 320 Ill. App. 88. That decision was rendered before the passage of the Lawyer's Bill of Rights, and is not an application in the instant case. It will be noted that Justice Thompson who wrote the opinion in that case, also wrote the opinion in Gunderson v. Chicago Bar Ass.

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

McGlynn, P. J., and Kiley, J., concur.

130 H

36649

HAZEL L. WRIGHT,
Appellee,

v.

STEVENS BROTHERS CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 624

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal court of Chicago, in an action of the first class, Hazel L. Wright sued Stevens Brothers Corporation. In a trial by the court there was a finding against the defendant and damages were assessed at the sum of $1,000. Defendant has appealed from a judgment entered upon the finding.

Plaintiff's statement of claim is as follows:

"1. That on or about March 1, 1928, Stevens Brothers Corporation, the defendant herein, a corporation doing business and residing at Chicago, Illinois, executed and issued its First Mortgage Sinking Fund 5% Gold Bond, Series A, numbered MX805, wherein said defendant agreed to pay to the bearer thereof the sum of $1,000 on March 1, 1948, with interest thereon at five per cent per annum payable semi-annually on March 1 and September 1 of each year.

"2. That Hazel L. Wright, the plaintiff herein, is now the bona fide owner and holder of said bond number MX805.

"3. That said bond is one of a series of bonds issued by said defendant, designated as Series A and secured by a Trust Deed dated March 1, 1928, executed by and between said defendant and Continental National Bank and Trust Company as Trustee, conveying certain leaseholds and real property known as State and Washington Buildings to said Trustee, in trust for the holders of said bonds.

"4. That on March 1, 1932, said defendant failed to pay the accrued interest or principal on said bond or any bonds of said series since September 1, 1931.

"5. That said bond contains the following provision for accelerating the maturity date thereof: 'In case of default in the payment of any installment of interest on any bond of said

Series A and the continuance thereof for a period of thirty (30) days, the principal of all of the bonds of said Series A may be declared due and payable prior to their fixed maturity in the manner and upon the conditions expressed in said Indenture, and may otherwise be declared due and payable prior to such fixed maturity upon the occurrence and continuance of other defaults as in said Indenture provided.'

"6. That the words 'said Indenture' in said provision refer to the aforesaid Trust Deed described in paragraph 3 of this statement of claim and that Sec. 2 of Article VI of said Trust deed is in words and figures as follows: 'In case default shall be made in the payment of any interest on any bond hereby secured and any such default shall have continued for a period of thirty (30) days, then and in every case the Trustee may, and upon the written request of the holders of not less than twenty-five per centum (25%) in principal amount of all of the outstanding bonds of the series in which the bond in respect of which such default has occurred is included, shall, by notice in writing, delivered to the Company, declare the principal of all of the outstanding bonds of such series to be due and payable immediately, and upon such declaration the same shall become and be due and payable immediately, anything in this Indenture or in said bonds to the contrary notwithstanding.'

"7. That said Trustee did, in accordance with said provision, declare the principal amount of all of said bonds of said Series A, including the bond owned by the plaintiff, immediately due and payable and subsequently on the 26th day of September, 1932, filed its bill of complaint in the Superior Court of Cook County, Illinois, to foreclose the lien of said Trust Deed, which suit is numbered 566164 and is now pending and undetermined in said court.

"8. Therefore, the plaintiff prays judgment against the defendant in the sum of $1,000, with interest at 5% from September 1, 1932."

Defendant's affidavit of merits alleges:

"(1) That the bond described in the statement of claim herein, upon which plaintiff bases her claim, provides by its terms that it should be payable on March 1, 1948, and consequently has not matured as yet.

"(2) That the bond described in the statement of claim herein, upon which plaintiff bases her claim, is one of a series designated as Series A secured by a trust deed dated March 1, 1928, executed by defendant to Continental National Bank and Trust Company, as Trustee; that said bond was issued in 'pursuance' of said trust deed; that plaintiff acquires the said bond under the conditions as set forth in said trust deed and the rights and remedies of plaintiff in connection with said bond are expressly defined and limited by the provisions of said trust deed, and defendant says such provisions are binding on plaintiff.

"(3) That in that part of Section 9 of Article 6 of the said trust deed to the Continental National Bank and Trust Company, as Trustee, which deals with Series A bondholders, it is provided as follows:

"'No holder of any bond or coupon of Series A shall

any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this Indenture, or for the execution of any trust hereof, or for the appointment of a Receiver or for any other remedy hereunder, unless such holder shall previously have given to the Trustee written notice of default, and of the continuance thereof as hereinbefore provided; nor unless, also, the holders of one-fourth in amount of the bonds of Series A then outstanding shall have made written request of the Trustee, and shall have afforded to it a reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding, in its own name (and the Trustee shall have refused or unreasonably delayed to comply with such request), nor unless, also, they or some one or more of them shall have offered to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and such notification, request and offer of indemnity are hereby declared in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this Indenture for the benefit of the bondholders, and to any action or cause of action for foreclosure, or for the appointment of a Receiver, or for any other remedy hereunder, it being understood and intended that no one or more holders of bonds or coupons of Series A shall have any right in any manner whatever, by his or their action to affect, disturb or prejudice the lien of this Indenture, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided, and for the equal benefit of all holders of such outstanding bonds and coupons.'

"(4) That in and by the provision of said trust deed above set forth, it is provided, among other things, that no bondholder shall bring any action at law or in equity without complying with certain conditions precedent as to notification, request and offer of indemnity to the Trustee followed by refusal or unreasonable delay on the part of the Trustee to bring some action.

"(5) That plaintiff has not given written notice of default to the Trustee, as required, and has not offered indemnity to the Trustee; that the Trustee has not refused to institute some action, nor has it unreasonably delayed in so doing, but on the contrary the Trustee has filed a bill of complaint in the Superior Court of Cook County, Illinois, Number 566184 to foreclose the lien of said trust deed for the benefit of the bondholders.

"(6) That in and by the provision of the trust deed above set forth, it is provided, among other things, that no holder of bonds or coupons shall have the right in any manner whatever to affect, disturb or prejudice the lien of the trust deed, and that all proceedings at law or in equity must be maintained for the equal benefit of all holders of bonds and coupons.

"(7) That this action will affect, disturb and prejudice the lien of the trust deed, and is not a proceeding for the equal benefit of all holders of bonds and coupons.

"(8) Therefore, affiant denies that it is liable in respect of the supposed cause of action in the statement of claim set forth in the manner and form as the plaintiff has alleged."

The defendant contends that "the provision for acceleration of maturity contained in the trust deed and not in

the bond does not accelerate the maturity of the bond to the extent that the plaintiff may maintain an action at law thereon, but accelerates maturity merely for the purpose of foreclosure or action at law by the trustee, and the trustee is the only party that may take advantage of the accelerated maturity." In determining this contention it must be noted that plaintiff, in her statement of claim alleges "that said Trustee did, in accordance with said provision, declare the principal amount of all of said bonds of said Series A, including the bond owned by the plaintiff, immediately due and payable and subsequently on the 26th day of September, 1932, filed its bill of complaint in the Superior Court of Cook County, Illinois, to foreclose the lien of said Trust Deed, which suit is numbered 566164 and is now pending and undetermined in said court," and defendant, in its affidavit of merits, avers "that the Trustee has not refused to institute some action, nor has it unreasonably delayed in so doing, but on the contrary the Trustee has filed a bill of complaint in the Superior Court of Cook County, Illinois, Number 566164 to foreclose the lien of said trust deed for the benefit of the bondholders." In the affidavit there is no denial of the allegation in the statement of claim that the trustee declared the principal amount of all of the bonds of Series A, including the bond owned by the plaintiff, immediately due and payable. A like contention to the instant one was raised in Schatzkis v. Rosenwald & Weil, 267 Ill. App. 169, 173, and was decided adversely to defendant's contention. We adhere to our ruling in that case. The acceleration provision did not make the bond non-negotiable. (Faercke v. Paine, 251 Mich. 636, 646; Schatzkis v. Rosenwald & Weil, supra.)

The defendant contends that "the trust deed, upon which plaintiff relies for an essential element of her cause of action, by its express terms and by necessary implication prohibits an action

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at law by the plaintiff upon the bond in suit and expressly provides that all actions in law or in equity upon the bonds or upon the trust deed be brought by the trustee for the benefit of all of the bondholders." After a careful consideration of section 9, the only one relied upon by defendant in its affidavit of merits in support of the instant contention, we have reached the conclusion that that section does not bar the commencement of the instant action and that it was intended only to control the bondholders' remedies against the property secured by the trust deed. (See Gauss v. Simon, 268 Ill. App. 196; Schatzkis v. Rosenwald & Weil, supra.) We cannot agree with defendant's argument that Pflueger v. Broadway Tr. and Sav. Bank, 351 Ill. 170, and Paepcke v. Paine, supra, are authorities in support of its contention. We think these cases support the contention of plaintiff that the bond in the instant case was a negotiable instrument and governed by the laws applicable to such instruments. Our Supreme court, in the Pflueger case, quotes freely, and with approval, from the Paepcke case. In the Paepcke case the court states: "The note, if it be negotiable in form, is governed by the law applicable to negotiable instruments, and the mortgage by the law of real property. The holder of such a note may abandon his security, and seek to enforce payment of it according to its terms as written;" and, in referring to a provision in the nature of an agreement among the bondholders that the trustee shall represent all of them in any action which may be brought to enforce collection, the court said: "It does not prescribe the right of a holder to sue in his own name as a necessary element of negotiability." We are satisfied that these two cases are authorities in support of the right of plaintiff to sue in the instant action.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

as law by the plaintiff upon the bond to wait not expressly provided that all actions in law or in equity upon the bond, or upon the bond must be brought by the trustee for the benefit of all of the bondholders." After a careful examination of matters by the only one relied upon by defendant in the affidavit of merits in support of the instant motion, we have reached the conclusion that that position does not bar the bondholders of the instant action and that it was intended only to protect the bondholders' remedies against the property secured by the bond deed. Cf. Kinney v. Jones, 222 Ill. App. 1[illegible] (Abstract v. Commercial & Trade Mutual to extent agree with plaintiff's argument that Clement v. Brewster Tr. and Sav. Bank, 321 Ill. 3[illegible] and Quarles v. Jones, are inapplicable in support of the contention. If this is true then under the peculiar facts of plaintiff's case the bond is not a negotiable instrument and governed by the Uniform Negotiable Instruments Law. Our decree must, in the Clement case, rather "rely, and rightly, from the Quarles case. In the Quarles case the court stated: "The note, if it be negotiable in form, is governed by the law applicable to negotiable instruments, and the mortgage by the law of real property. The nature of such a note may therefore affect mortgagee, and such is certainly of it according to its terms an obligation" and, in referring to a provision in the mortgage of an agreement among the bondholders that the trustee shall represent all of them in any action which may be brought to enforce obligations, the court said: "It does not preclude the right of a holder to sue in his own name on a negotiable element of negotiability." We are satisfied that there has been no abdication in support of the right of plaintiff to sue in the instant action.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matthews, P. J., and Sullivan, J., concur.

131 A

36696

STELLA W. FRIEDMAN,
Appellee,

v.

CADILLAC MOTOR CAR COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

272 I.A. 624[3]

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Cadillac Motor Car Company, a corporation, defendant, appeals from a judgment for $600 entered in favor of the plaintiff, Stella W. Friedman, upon the verdict of a jury.

Plaintiff's statement of claim alleges that on December 2, 1931, she sold and delivered to defendant her seven-passenger Cadillac sedan for the agreed price of $1,200, which defendant agreed to pay to her within a few days after delivery by her to it of said car; that within a few days thereafter defendant paid her the sum of $600 on account of the purchase price, but failed to pay the balance due her.

Defendant's affidavit of merits alleges that the transaction in question was an agreement by plaintiff to purchase a new Cadillac automobile from defendant, model to be selected for delivery on or about April 1, 1932; that defendant agreed to take plaintiff's Cadillac car and to allow her $1,200 on the purchase price of the new car, but that by the terms of the agreement the title to plaintiff's said automobile was then and there conveyed to defendant; that on December 4 plaintiff requested of defendant an advance of $600 and that defendant, relying on the promise of plaintiff to purchase and pay for a new Cadillac automobile, and having possession and title to the automobile of plaintiff,

[illegible]

[illegible]

[illegible]

complied with this request; that plaintiff thereafter refused to perform her promise to purchase a new automobile from defendant.

Defendant has raised five contentions in support of its argument that the judgment of the Municipal court of Chicago should be reversed and the cause remanded, but in the view that we have taken of this appeal it is necessary for us to consider only one.

Defendant contends that the verdict of the jury is against the manifest weight of the evidence, and after a careful consideration of the evidence, including the documentary evidence, we have reached the conclusion that the instant contention is a meritorious one. As this case may be tried again, we refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

analyze with care, expecially that plausibility theorefor referred to petitions for pardons to procure a new examination from different.

Instances has raised five contentions in support of the argument that the judgment of the Municipal court of Chicago should be reversed and the cause remanded, but in the view that we have taken of this appeal it is necessary for us to consider only one.

Instructions contends that the verdict of the jury is against the manifest weight of the evidence, and after a careful examination of the evidence, including the documentary evidence, we have reached the conclusion that the Instructs conversation is a reasonable one. In this case may be their rights, or infringe from judging and commonly upon the fields and circumstances in evidence.

The judgment of the Municipal court of Chicago is affirmed and the cause is remanded.

BRIGHAM, PRESIDING.

Mallison, P.J., and Kirkpatrick, dir concur.

36808

132

A

FIRST UNION TRUST AND SAVINGS BANK, as trustee under trust deed recorded as document No. 9200333,

Complainant,

v.

DIVISION STATE BANK, a corporation, as trustee under trust deed recorded February 19, 1931, as document No. 10848331. C.W. Davenport, as receiver of said Division State Bank; Esther Homer and Joseph Homer, her husband, Virginia Homer and Louis Homer, her husband; Rebecca Homer and Jack Homer, her husband; Minnie Homer and Abe Homer, her husband; S. J. Berger, doing business as Berger Electric Company; Harriet Amusement Company, William Halperin, Commercial Light Company, General Talking Pictures Corporation, Joseph P. Vovesny, Nathan Levine, A. Rowinson, E. and F. Meat Market, John A. Rush, Herbert W. Magnuson, Edward Kouch, Peter Mokas, John Botiras and "Unknown Owners,"

Defendants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

272 I.A. 624

Esther Homer, Joseph Homer, Virginia Homer, Louis Homer, Rebecca Homer Jack Homer, Minnie Homer and Abe Homer,

Petitioners (Appellees),

v.

First Union Trust and Savings Bank, as trustee under trust deed recorded as Document No. 9200333,

Respondent, (Appellant).

Opinion filed Nov. 21, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This appeal, by order of the court, has been consolidated with case No. 36918 for the hearing. A motion to dismiss this appeal was made upon the ground that the order appealed from was not a final order, which motion was reserved to the hearing. The questions involved in this appeal are fully covered in this court's opinion filed in case No. 36918, which is an interlocutory appeal from the same order. The order appealed from herein is not a final order, therefore, the order of this court is that this appeal be dismissed.

DISMISSED.

WILSON AND MEBEL, JJ. CONCUR.

Opinion filed Nov. 21, 1933

This appeal, by order of the court, has been consolidated with case No. 28232 for the hearing. A motion to dismiss this appeal was made upon the ground that the order appealed from was not a final order, which motion was reserved to the hearing. The questions involved in this appeal are fully covered in this court's opinion filed in case No. 28232, which is an interlocutory appeal from the same order. The order appealed from herein is not a final order, therefore, the order of this court is that this appeal be dismissed.

DISMISSED.

36671

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FANNIE BURKHARDT,
Appellant,

vs.

HENRY BURKHARDT,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

272 I.A. 625

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case to recover damages which she sustained, as she averred, by reason of defendant's negligence on October 28, 1930, when she was riding as a guest in his automobile. The first count of the amended declaration averred that Victor Burkhardt, the agent of defendant, was at that time driving defendant's automobile on Ashland avenue in the city of Chicago near the intersection of the same with Dixie highway in Cook county; that plaintiff was riding as an invited guest and was in the exercise of due care, but that defendant carelessly and negligently drove the automobile off the ground portion of the road and across a ditch into an adjoining field, and that thereby plaintiff was injured. The second count averred that defendant drove at a dangerous rate of speed, and the third that defendant failed to come to a full and complete stop before driving on the paved portion of Dixie highway in violation of the statutes.

There was a plea of not guilty and a special plea asserting non-operation of the automobile, trial by jury, a verdict for defendant, motion by plaintiff for a new trial, which was overruled and judgment for defendant on the verdict, which plaintiff seeks to reverse.

It is urged by plaintiff that the verdict is against the manifest weight of the evidence; that defendant was guilty of negligence in not coming to a complete stop before entering upon and driving over Dixie highway, which was a State route; that this was negligence per se and the proximate cause of plaintiff's

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[illegible]

Appellant,

vs.

[illegible],

Appellee.

[illegible]

[illegible]

[illegible]

injuries; that the court erred in giving instructions at the request of defendant, and that defendant's attorney was guilty of prejudicial conduct in the presence of the jury.

Plaintiff's suit was originally brought against Henry Burkhardt, the owner, and Victor, his son, who was driving the car at the time plaintiff was injured, but at the close of all the evidence she took a non-suit as to Victor. Upon what theory it was supposed that Henry, who owned the car, was guilty, while Victor, who drove it, was not guilty, is difficult to understand. The parties were all related. Defendant, Henry Burkhardt, had a brother George, and they together conducted a business of manufacturing soft drinks in the city of Chicago. George Burkhardt is the husband of plaintiff. Victor Burkhardt, son of Henry, was engaged in the same business as his father and uncle. George Burkhardt, was 31 years of age and married. He refers in his testimony to plaintiff as "Aunt Fannie" and to her husband as "Uncle George."

The action is one which under the law as it now exists in this State could not be maintained. See Smith-Hurd's Ill. Rev. Stats. 1931, chap. 121, sec. 243, p. 2534, which provides:

> "No person riding in a motor vehicle as a guest, without payment for such ride ** shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner or his employee or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator ***."

A somewhat similar statute enacted in the state of Connecticut was held to be constitutional in Silver v. Silver, 280 U.S. 117. The Illinois statute was passed subsequent to the date of this accident but prior to the institution of the suit. Defendant suggests that plaintiff had no vested right in her cause of action, and that she might therefore have been precluded from bringing her suit; but that question was not raised upon the trial, and its consideration is not in our opinion necessary to a decision of this

judgment; that the court erred in giving instructions at the request of defendant, and that defendant's attorney was guilty of prejudicial conduct in the presence of the jury.

Plaintiff's only was negligently struck against Henry Hartwig, the owner, and Victor, his son, who was driving the car at the time plaintiff was injured, but at the close of all the evidence the trial c nonsuit as to Victor. When was Henry is was argued that Henry, who owned the car, was guilty, while Victor, who drove it, was not guilty, is sufficient to constitute the parties were all related. Defendants, Henry Hartwig, had a timber business, and they together constituted a business of manufacturing and selling wagons in the city of Chicago. Henry Hartwig is the husband of plaintiff. Victor Hartwig, son of Henry, was engaged in the same business as his father and mother, being twenty years, was 23 years of age and married. He refers in his testimony to plaintiff as "Aunt Bessie" and to her husband as "Uncle Henry."

The action is one which under the law as it now exists in this State could not be maintained. See Hartwig's v. Hay, 61 Ill. App. 324, affd. 158, 444, 41 N. E. 1104, which provides:

"No person riding in a motor vehicle as a guest, without payment for such ride, shall have a cause of action for damages against the driver or operator of such motor vehicle or his employer or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the willful act or gross negligence of the driver or operator."

A somewhat similar statute existed in the state of Massachusetts when the suit in question was instituted in Gilmer v. Gilmer, 80 N. E. 117. The Illinois statute was passed subsequent to the date of this accident but prior to the institution of the suit. Defendant argues that plaintiff had no vested right in her cause of action, and that the right otherwise were been prevented from bringing her suit; the home question was not raised upon the trial, and its consideration is not in our opinion necessary in a decision of this

case. The statute, however, does show that the settled policy of the State is against the encouragement of suits of this character.

One of the controlling questions upon the record is whether the verdict of the jury is clearly and manifestly against the weight of the evidence. The evidence is ~~xxx~~ conflicting to some ~~xxxxxxxx~~ degree, but the issues of fact must be regarded as settled in defendant's favor by the verdict of the jury.

There is evidence in the record from which the jury could properly find that defendant, Henry Burkhardt, is the owner of the automobile in question; that it was a Packard sedan; that on the evening of the day of the accident, October 28, 1930, the two Burkhardt families in Chicago decided to visit the family of a cousin living in Chicago Heights, one of whom was upon that evening receiving a degree in Masonry; that by previous arrangement Henry Burkhardt's car was driven over to the Chicago residence of plaintiff, 4244 West 22nd street, where they picked up plaintiff, and was then driven to Chicago Heights, arriving there about six o'clock p. m.; that plaintiff remained at the home of this cousin in Chicago Heights during the evening while the men went to the lodge hall; that after the installation they returned to the Chicago Heights home, where plaintiff and the rest of the party reentered defendant's car and started on the return trip to Chicago about twelve o'clock midnight. Plaintiff occupied the rear seat to the left, her husband the rear seat to the right. Defendant, Henry Burkhardt, was in the front seat to the right, while Victor, the driver, occupied the front seat to the left. Victor had eleven years of experience as a driver and usually drove his father's car when he was with his father.

The home of the cousin was on the edge of a new subdivision in the outskirts of Chicago Heights; the streets in this subdivision were winding and turning. The home was located one block from Ashland

case. The statute, however, does state that the actual value of the State in against the commencement of suits of this character.

One of the controlling questions upon the record is whether the verdict of the jury in clearly and manifestly against the weight of the evidence. The evidence in some respects is [illegible] doubtful, but the issues of fact seem to resolve in defendant's favor by the verdict of the jury.

There is evidence in the record from which the jury could properly find that defendant, Henry Burkhardt, in the course of the transaction in question; that it was a forbidden action; that on the morning of the day of the accident, October 22, 19[illegible], the two Burkhardt families in Chicago decided to visit the family of a certain living in Chicago Heights, and of whom was upon that morning receiving a degree in Masonry; that by previous arrangements Henry Burkhardt's car was driven over to the Chicago residence of plaintiff, 4924 Fond Du Lac street, where they planned up plaintiff, and was then driven to Chicago Heights, arriving there about six o'clock p. m.; that plaintiff remained at the home of this couple in Chicago Heights during the evening while the men went to the lodge hall; that after the installation they returned to the Chicago Heights home, where plaintiff and the rest of the party remained Defendant's car was driven on the return trip to Chicago about twelve o'clock midnight. Plaintiff occupied the rear seat to the left, her husband the rear seat to the right. Defendant, Henry Burkhardt, was in the front seat to the right, Mrs. Vinton, the driver, occupied the front seat to the left. Vinton had driven years of experience as a driver and usually drove his father's car when he was with his father.

The road at the scene was on the side of a gentle elevation in the outskirts of Chicago Heights; the street is fair and level were wending and twisting. The home was located one block from Dixie

avenue and it was necessary for the automobile to make two turns to reach that avenue. Victor, the driver, had never before been out to this location in the night time. He and his father testified that it was a very dark night, and that there was haze and mist. Victor says that on account of the winding driveways in the subdivision, the darkness, the weather conditions and the unfamiliarity with the particular locality, he assumed that when he turned into Ashland avenue he was "picking up" Lincoln highway, which it was his intention to take.

The testimony of plaintiff and her husband was to the effect that it was a clear night, the stars and moon were out, and that it was very light at the time of the accident. The testimony of defendant and his son is corroborated by a certificate of the U. S. Weather Bureau, which is in evidence and which shows that the moon set at 10:09 p. m., and that before it set it was obscured by clouds. There was no artificial light on Ashland avenue at the time in question other than the rays of the headlights on the automobile. Ashland avenue has a concrete slab pavement and ends at the point where it intersects Dixie highway. There was no artificial light at the intersection, and there was no barricade, red reflector or warning device of any kind at the end of the street. There were one or two small unlighted signs to the right of the pavement. One, which was about 100 feet from the corner, had the wording, "Junction Dixie Hwy. Ill. Rt. 1," in yellow letters on black; the other sign, 10 feet from the corner, had the word "Stop" in yellow letters on black. The slabs of concrete pavement were joined by tar or a dark preparation which made pronounced lines lengthwise on the pavement, and these lines extended straight a considerable distance beyond the stop sign and into the intersection, thus giving the appearance of continuance to the pavement to one driving thereon, with the aid of headlights.

avenue and it was necessary for the motorcycle to make two turns to reach that avenue. Yeats, the driver, had never before been at this junction in the night time. He and his father testified that it was a very dark night, and that there was rain and mist. Yeats says that on account of the existing drizzle in the neighborhood, the darkness, the weather conditions and the unfamiliarity with the particular locality, he assumed that when he turned into Antoinette avenue he was "driving up" Antoinette alleyway, when it was his intention to turn.

The testimony of plaintiff and her husband was to the effect that it was a clear night, the stars had been very out, and that it was very light at the time of the accident. The testimony of defendants and his son is corroborated by a certificate of the U. S. Weather Bureau, which is in evidence and which shows that the moon set at 12:00 p. m., and that before it had in was obscured by clouds. There was no artificial light on Antoinette avenue at the time in question other than the rays of the moonlight on the automobile. Antoinette avenue has a concrete alley-way on one side at the point where it intersects Pitts Alleyway. There was no artificial light at the intersection, and there was no traffic, yet Pittsburgh or parking device of any kind at the end of the street. There were one or two small unlighted signs to the right of the crossing, one, which was about 3:0 feet from the curbing, and the another, "Antoinette Alley Ent. 11X. No. 3," in yellow letters on black; the other sign, 12 feet from the corner, had the word "Stop" in yellow letters on black. The sides of concrete pavement were joined by but a few structures which made crossing lines indistinct on the pavement, and those lines scarcely alright a particularly stranger beyond the stop sign and into the intersection, thus giving the appearance of continuous to the pavement to one driving thereon, with the aid of headlights.

In the field beyond the end of the street there were weeds and trees. Pictures of the place where the accident occurred are in the record but were taken in the daytime and, of course, do not show the appearance of the road at night. There is testimony from which the jury might believe that while one could see in the daytime that the road terminated there, that would not so appear at night.

The testimony is to the effect that after entering Ashland avenue, which the driver and his father both thought was Lincoln highway, the driver proceeded at about a speed of 40 to 45 miles an hour. He saw a street extending to his right and left and noticed he was approaching a ditch in the field. He was then about a third of the way across the Dixie highway intersection. The father testified that he realized the danger when they were about the center of Dixie highway. The driver applied the brakes and continued straight ahead, fearing, as he says, that if he swerved the car it would turn over. The car continued straight ahead over the shoulder of the road across the ditch and into a cornfield, and plaintiff was injured by the jar she received in passing over the ditch.

Both plaintiff and her husband testified that they did not consider that the car was traveling at an unusual speed. Plaintiff said she knew before they reached the intersection that they were driving north on Ashland avenue; that she had passed by the place quite often. She further testified that she warned the driver by saying, "Victor, there is a stop sign" when they were almost alongside of it; she was corroborated by her husband on this point, but the driver and his father denied there was any such warning or exclamation. The verdict of the jury would seem to settle this contention in favor of defendant.

Defendant contends that the evidence does not preponderate in favor of plaintiff but on the contrary, conceding that the driver was negligent, shows that plaintiff was guilty of contributory

In the field beyond the end of the street there were weeds and trees. Figures of the girls under the accident counted and in the record but were taken in the daytime and, of course, in not when the occurrence of the road at night. There is testimony from which the jury might believe that while one would see in the daytime that the road terminated there, that would not be apparent at night.

The testimony is to the effect that after reaching Ashland avenue, which the driver and his father both thought was Lincoln highway, the driver proceeded at about a speed of 40 to 45 miles an hour. As now a street extending to his right was left and noticed he was approaching a ditch in the field. He was then about a third of the way across the State highway intersection. The father testified that he realized the danger when they were about the center of State highway. The driver applied the brakes and continued straight ahead, fearing, as he says, that if he swerved the car it would turn over. The car continued straight ahead over the shoulder of the road across the ditch and into a cornfield, and eventually was injured by the jar she received in passing over the drain.

Both PLAINTIFF and her husband testified that they did not remember that the car was traveling at an unusual speed. Plaintiff said she knew before they reached the intersection that they were driving north on Ashland avenue; that she had passed by the place quite often. The father testified that she warned the driver by saying, "Victor, there is a stop sign" when they were almost alongside of it; she was corroborated by her husband on this point, but the driver and his father denied there was any such warning or admonition. The verdict of the jury could not be setting this testimony in favor of defendant.

Defendant contends that the evidence was not preponderate in favor of plaintiff but on the contrary, according that the driver was negligent, show that plaintiff was guilty of contributory

negligence, and he contends, citing cases, that a passenger in a vehicle cannot rely solely on the driver but must exercise ordinary care for his own safety and must observe and avoid danger, if practicable, and warn the driver. He cites Flynn v. C. C. Ry., 250 Ill. 460; Fiente v. C. C. Ry., 284 Ill. 246; Opp v. Fryer, 294 Ill. 538; Griffenhan v. C. Ry., 299 Ill. 595; Morgan v. N. S. & J. Ry., 251 Ill. App. 127; Riederle v. C. A. T. Co., 264 Ill.App. 346.

The evidence, as we see it, made an issue for the jury as to whether plaintiff exercised ordinary care for her safety. She was familiar with the road and with the locality. She should have been on the lookout and should have warned the driver of any approaching danger, if it existed. She says she did, but there was evidence to the contrary which the jury apparently believed, as it had a right to do.

We think the court did not err in denying the motion for a new trial for the reason that the jury could properly believe from the evidence that plaintiff was guilty of contributory negligence and therefore is without the right to recover. Lanley v. Crawford, 228 Ill. App. 590, and Warput v. Reading Coal Co., 250 Ill.App.450.

Numerous complaints are made by plaintiff concerning the instructions given at the request of defendant. Particularly, she complains of instruction No. 5, by which the jury was told that the driver of the vehicle was not required by law to exercise the highest degree of care or diligence, but was required to exercise only ordinary care, and that the law did not require the driver to exercise "any higher degree of care for the plaintiff than it required of the plaintiff to exercise for herself." Plaintiff argues, on the authority of Walsh v. Moore, 244 Ill. App. 456, that it was error to so instruct the jury, because plaintiff while riding in the rear seat of the automobile had nothing to do with driving the automobile.

(Schenck v. Chicago Rys. Co., 211 Ill. App. 466)

We think this instruction might tend to mislead, but is

negligence, will be sustained, citing cases, that a passenger is a vehicle guest only insofar as the driver has such exclusive authority over his own safety and must observe and avoid danger, if practicable, and warn the driver. He cites Jones v. C. G. Co., 290 Ill. 401; Ziegler v. C. G. Co., 290 Ill. 9; Ward v. Ry. Co., 290 Ill. 448; Cox v. Ryan, 290 Ill. 528; Brickman v. C. G. Co., 290 Ill. 111; Gaines v. C. G. C. Co., 290 Ill. 111; Ayo. 1927; Blackie v. C. G. Co., 290 Ill. 111; Ayo. 1927.

The evidence, as we see it, made no issue for the jury as to whether plaintiff exercised reasonable care for her safety. The case familiar with the road and with the locality. She could have gone on the journey and should have warned the driver of any approaching danger, if it existed. The jury saw her, but gave the evidence to the contrary which the jury apparently believed, as it had a right to do.

We think the court did not err in denying the motion for a new trial for the reason that the jury could reasonably believe from the evidence that plaintiff was guilty of contributory negligence and therefore is without the right to recover. Illinois C. Railroad, 290 Ill. App. 528, and Grant v. Chicago Ry. Co., 19 Ill. App. 100.

A material misstatement was made by plaintiff concerning the instructions given at the request of defendant. Particularly, the statement of instruction No. 8, by which the jury was told that the driver of the vehicle was not required by law to exercise the highest degree of care or diligence, but was required to exercise only ordinary care, and that the law did not require the driver to exercise "any higher degree of care for the plaintiff than is required of the plaintiff to exercise for herself." Plaintiff argues, on the authority of Tuck v. Ryan, 290 Ill. App. 528, that if she error to instruct the jury, because plaintiff while riding in the rear seat of the automobile had nothing to do with driving the automobile.

Lindman v. Chicago Ry. Co., 290 Ill. App. 528.

We think this instruction might have been misleading, but in

not reversibly erroneous under facts such as appear in this case. The purpose of the instruction given evidently was to inform the jurors that the standard of care required of one who was transporting a guest, as in the present case, would not be of the highest degree. The reference was to the standard or degree of care rather than to particular conduct, and that standard is the same whether for plaintiff or for defendant. However, plaintiff's given instruction No. 7 announced the same rule, and she cannot complain of an instruction given by defendant which announced the same rule as that laid down in an instruction requested by her.

Plaintiff next complains of defendant's instruction No. 9, by which the jury was told that if she by using her faculties with ordinary and reasonable care in looking out for danger could have avoided the injury, and that she negligently failed to do so, thereby proximately contributing to bring about the accident and injury to herself, she could not recover. Plaintiff says that this is a peremptory instruction and assumes that plaintiff did not use reasonable care to avoid danger and is not in conformity with the evidence, and cites Theisen v. Borgard, 183 Ill. App. 158. That decision in substance holds that an instruction is erroneous which tells the jurors that they may consider certain matters if they are proved, when, as a matter of fact, there is no evidence in the record upon which to base the instruction. As we have already pointed out, that is not the case here. The instruction in this case does not assume that plaintiff was negligent. It is expressly conditioned upon the belief by the jury from the evidence, and this clause modifies the entire sentence.

Plaintiff next complains of instruction No. 10, by which the jury was told in substance that while the law permitted plaintiff to testify in her own behalf, nevertheless the jury had the right in weighing her evidence to determine how much credence must

not reversible errors under facts such as appear in this case. The purpose of the instruction given evidently was to inform the jurors that the standard of care required of one who was innocent of a peril, as is the present case, would not be of the highest degree. The reference was to the standard of degree of care rather than to particular conduct, and that standard is the same whether for plaintiff or for defendant. However, plaintiff's given instruction No. 7 announced the same rule, but the correct application of an instruction given by defendant which commended the rule into the jury's instruction requested by her.

Plaintiff next complains of defendant's instruction no. 9, by which the jury was told that if she by reason her familiarity with premises and surroundings were in leading her for danger could have avoided the injury, and that she negligently failed to do so, thereby proximately contributing to bring about the accident and injury in herself, she could not recover. Plaintiff says that this is a misleading instruction and assumes that plaintiff did not use reasonable care to avoid danger and is not in conformity with the evidence, and cites Thelen v. Gerhard, 128 Ill. App. 120. That decision is referred to as holding that an instruction is erroneous which tells the jurors that they may consider certain matters if they are proved, when, as a matter of fact, there is no evidence in the record upon which to base the instruction. As we have already pointed out, that is not the case here. The instruction in this case does not assume that plaintiff was negligent. It is expressly conditioned upon the belief by the jury from the evidence, and this clause modifies the entire sentence.

Plaintiff next complains of instruction no. 10, by which the jury was told in substance that while the law recognizes plaintiff's security in her own behalf, nevertheless the jury had the right in weighing her evidence to determine her mental capacity must

be given to it to take into consideration the fact that she was the plaintiff and interested in the result of the case. Plaintiff points out that in Dickerson v. Henrietta Coal Co., 251 Ill. 292, the trial court modified this instruction by adding the words, "and should judge the weight of his testimony by the same tests applied to other witnesses," and that the Supreme court held that the addition of that clause did not make the instruction erroneous. This is far from condemning the instruction itself.

In West Chicago St. R. R. Co. v. Dougherty, 170 Ill. 379, the refusal of the trial court to give this instruction was held error.

Plaintiff also complains of defendant's instruction No. 13, by which the jurors were told that they were not required to believe any statement to be a fact simply because any witness or any number of witnesses have sworn it to be a fact, if they believed from the evidence that such witness or witnesses had wilfully and knowingly sworn falsely, even if such witness or witnesses were not directly contradicted, and that in considering the case and in arriving at a verdict, the jurors were not required to set aside their own common observation and experience as men in the affairs of life, but that on the other hand they had the right, upon consideration of all the evidence in the case and their experience as men in the affairs of life, to say where the truth lay upon any material fact in the case. Plaintiff contends that this instruction ignores the proposition as to whether or not such testimony is corroborated by other credible evidence or facts and circumstances appearing in the evidence, and is also objectionable as permitting the jurors to inject their own observation and experience to determine the credibility of a witness. It is said the instruction is also erroneous in omitting the statutory requirement that the false testimony must be in reference to a matter material to the issue or

be given to it to take into consideration the fact that she was the plaintiff and interested in the result of the case. Plaintiff points out that in Dickerson v. Chesapeake Coal Co., 88 Ill. 223, the trial court modified this instruction by adding the words, "and should judge the weight of his testimony by the same tests applied to other witnesses," and that the Supreme Court held that the validity of that clause did not make the instruction erroneous. This is far from condemning the instruction itself.

In Ward Children Vs. C. & A. R. R. Company, 171 Ill. 498, the refusal of the trial court to give this instruction was held error.

Plaintiff also complains of defendant's instruction No. 12, by which the jurors were told that they were not required to believe any statement to be a fact simply because any witness or any number of witnesses have sworn it to be a fact, if they believed from the evidence that such witness or witnesses had wilfully and knowingly sworn falsely, even if such witness or witnesses were not directly contradicted, and that in considering the case and in arriving at a verdict, the jurors were not required to set aside their own common observation and experience as men in the affairs of life, but that on the other hand they had the right, upon consideration of all the evidence in the case and their observations as men in the affairs of life, to say which witnesses they believed and which they disbelieved. Plaintiff contends that this instruction ignores the proposition as to whether or not such testimony is corroborated by other credible evidence or facts and circumstances appearing in the evidence, and is also objectionable as permitting the jurors to judge solely from observation and experience to determine the credibility of a witness. It is said the instruction is also erroneous in omitting the statutory requirement that the false testimony must be in reference to a material matter to the issue or

point in question.

The instruction is not vulnerable to these objections, and similar instructions have often been approved by the Supreme court and by this court. Devaney v. Otis Elevator Co., 251 Ill. 28; People v. Turner, 265 Ill. 594; Kankakee Park District v. Heidenreich, 326 Ill. 198; Oliver v. Oliver, 340 Ill. 445; People v. Palmer, 351 Ill. 319; Sebree v. Thomas, 166 Ill. App. 427.

Complaint is also made that defendant's counsel was guilty of prejudicial conduct. We have carefully examined the record as to the incidents complained of but find no reversible error with respect to the same.

For reasons which we have indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

error in question.

The instructions in was voluntarily to these objections, and similar instructions have often been approved by the Supreme Court and by this court. Spencer v. Ohio District Ct., 386 III. 19; People v. Turner, 385 III. 333; Schomer Cook Dairies v. Lindgren, 386 III. 198; Glover v. Glover, 380 III. 443; People v. Flaher, 381 III. 339; Spence v. Thomas, 368 III. App. 447.

Counsel's in also made that defendant's counsel was guilty of prejudicial conduct. The lower court fully considered his remarks in the instructions concluded of but view we reversible error with respect to the same.

The remarks which we have indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and Lindsay, JJ., concur.

36791

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant,

vs.

PIOWATY-BERLINER, INC.,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 625

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment in favor of defendant entered upon the verdict of a jury after a motion for a new trial had been overruled. Defendant has not appeared in this court in support of the judgment.

The statement of claim averred that about May 11, 1931, M. Frank Produce Co., Inc., a corporation of Foley, Alabama, being the owner of two carloads of potatoes, shipped the same to defendants at Chicago, and while the potatoes were en route and before delivery thereof the shipper caused the same to be reconsigned to itself at Chicago, "advise Piowaty-Berliner, Inc.," by reason of which the potatoes remained the property of the M. Frank Produce Co. and would not become the property of or be delivered to Piowaty-Berliner, Inc., until a draft for the purchase price thereof should be paid to M. Frank Produce Co.; that on May 12, 1931, after the potatoes had been reconsigned, the M. Frank Produce Co. for a valuable consideration assigned and transferred to Bacon Bros. of Chicago, Illinois, all their right, title and interest in the potatoes and in the proceeds of the sale thereof, and that thereafter, on or about May 13, 1931, defendant obtained possession or control of these potatoes without paying the purchase price thereof or obtaining title thereto and converted the potatoes to its own use and caused the same to be delivered to other parties and collected and received the purchase price of the same to the amount of $690, which was the actual value of the potatoes at the time and place the same

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[illegible]

were converted; that defendant Railroad company, upon demand being made by Bacon Bros. for payment of the proceeds of the sale, refused to pay the same or any part thereof; that on or about September 21, 1931, in consideration of $690 then paid to them by plaintiff, Bacon Bros. assigned and transferred to plaintiff all their right, title and interest in and to the potatoes and the proceeds thereof, including all claim against defendant for damages for conversion of the potatoes and of the proceeds of the sale thereof; that plaintiff was the actual bona fide owner of the claim and acquired the same as above set forth and was entitled to receive from defendant the said sum of $690, which defendant refused to pay.

Defendant filed an affidavit of merits in which it averred that it had a good defense on the merits to the whole of the demand; that it did not know the facts with reference to the shipment, etc., as set up in the first three paragraphs of the statement of claim; but denied that it obtained possession of the potatoes without paying the purchase price, or obtained title thereto; further denied that Bacon Bros. made demand upon defendant for the potatoes or the proceeds of any sale thereof, or that defendant refused to deliver the potatoes or the proceeds to Bacon Bros. The affidavit of merits alleged that when defendant obtained possession of the two carloads of potatoes it had full right, title and interest in and to the same.

There is practically no conflict in the evidence which appears in this record as to any material point, and plaintiff contends that it was entitled to a directed verdict. The shipper of the potatoes, M. Frank Produce Co., while the potatoes were in transit and before they had been delivered, reconsigned these shipments to itself. The original bills of lading naming defendant as consignee were taken up by the Railroad company and new bills issued naming M. Frank Produce Co. as consignor and consignee. This was undoubtedly notice to the Railroad company, and the evidence

were conferred; that defendant railroad company, upon demand being made by Moses Dyer, for delivery of the premises of the sale, refused to pay the same or any part thereof; that on or about September 21, 1903, in consideration of one dollar paid to them by plaintiff, Dwight Hope, assigned and transferred to plaintiff all their right, title and interest in and to the policies and the proceeds thereof, including all claims against defendants for damages for conversion of the policies and of the property of the said insured; that plaintiff was the owner of the said policies and entitled to have an above set forth and was entitled to receive from defendant the sum of $500, which defendant refuses to pay.

Defendant filed an affidavit of merits in which it averred that it had a good defense on the merits in the suit of the Second; that it did not know the facts with reference to the assignment, etc., as set up in the first three paragraphs of the statement of claim; but denied that it obtained possession of the policies without paying the premium price, or obtained title thereto; further denied that Moses Dyer, made demand upon defendant for the policies or the proceeds of any sale thereof, or that defendant refused to deliver the policies or the proceeds to Moses Dyer. The affidavit of merits alleged that when defendant obtained possession of the two policies of policies it had full right, title and interest in and to the same.

There is practically no conflict in the evidence which appears in this record as to the material points, and plaintiff contends that it was entitled to a directed verdict. The origin of the policies, a. Frank Fletcher Co., which the policies were in trouble and later they had been delivered, respectively these subsequently were taken up by the Hartford company and new bills issued covering R. Frank Fletcher Co. as mortgagee and assignee. This was subsequently noted to the Hartford company, and the evidence

shows that the agent at the point of origin notified the agents of the carrier at Evansville, Indiana, of the reconsignment. The rule of law applicable is stated in 10 Corpus Juris 228 as follows:

"In the absence of a reservation of title by the consignor, the presumption of the passing of title to the consignee on delivery to the carrier will protect the carrier in delivering the goods to the consignee at the end of the transportation. But if it is notified by the consignor before delivery to the consignee not to make such delivery, then its duty in the premises depends on the actual facts as to whether the relations between the consignor and consignee were such that delivery to the carrier would constitute as between them a transfer of title."

The uncontradicted evidence here is to the effect that the M. Frank Produce Co. was at the time of reconsignment the owner of the shipments and entitled to possession. In the trial court defendant apparently relied on the theory that the original consignment of the shipments to it irrevocably transferred title to the goods, and that the shipper did not have any right of reconsignment. This is not the law. Unless defendant was the owner of the goods, the title would not vest in it on delivery of the shipments to the carrier, although the goods were consigned to it. Lewis v. Galena & Chicago Union R. R. Co., 40 Ill. 281; Strahorn v. Union Stock Yards etc. Co., 43 Ill. 424.

The evidence in the case showed that Bacon Bros. furnished the money to the M. Frank Co. for the purchase of these potatoes and that they took an assignment of the interest of the M. Frank Produce Co. on May 13th. Defendant offered evidence tending to show that in the course of its dealings it had made general advances of money either to M. Frank or to the M. Frank Produce Co., but there is no record in the evidence from which it might reasonably be found that there was any agreement that defendant was to have any interest in any particular shipment on account of these advances. The uncontradicted evidence is to the effect that the agreement between defendant and the M. Frank Produce Co. was that defendant's brokerage charges for handling the shipments were to be credited against the

account of M. Frank or M. Frank Produce Co., and that defendant was to pay for shipments by draft against the bill of lading.

The cases already cited are conclusive that the shipper had a right to reconsign, and upon its assignment of its rights to Bacon Bros. and notice thereof to the carrier, the carrier would become liable as for conversion in case it wrongfully delivered the shipment to another consignee, which the uncontradicted evidence shows it did in this case. The carrier by making an unauthorized delivery was undoubtedly liable with defendant as a joint tort feasor, but the evidence shows that the carrier was not guilty of intentional or conscious wrongdoing, and it could therefore take an assignment of the claim of Bacon Bros. Chicago Railways Co. v. Conway, 219 Ill. App. 220. Under the uncontradicted evidence plaintiff was entitled to recover as a matter of law, and the judgment for defendant will therefore be reversed, with a finding of facts, and judgment here for plaintiff for the sum of $690.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

O'Connor and McSurely, JJ., concur.

See next page.

36791 FINDING OF FACTS.

We find as facts that defendant converted to its own use two carloads of potatoes, the property of the M. Frank Produce Co., of the value of $690; that the claim of the M. Frank Produce Co. was duly assigned to Bacon Bros. and by Bacon Bros., for good and valuable consideration, to plaintiff Railroad company, and that plaintiff Railroad company as a matter of law and fact is entitled to recover in this court against defendant, Plowaty-Berliner, Inc., the sum of $690 on account of the conversion of said two carloads of potatoes.

38903

PETER C. McARDLE,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation, et al.,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

42

272 I.A. 625

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the City of Chicago, its Mayor and other named officials from a judgment entered April 26, 1933, which, overruling the demurrer of defendants to a petition theretofore filed (and defendants electing to stand by their said demurrer) awarded a mandamus against them as prayed for in the petition.

This controversy is the sequel to much and long continued litigation between the same parties. McArdle v. City of Chicago, 172 Ill. App. 142; McArdle v. City of Chicago, 216 Ill. App. 343. Petition for certiorari was denied April 22, 1920. That suit was begun by the filing by McArdle of an original petition for mandamus on May 11, 1908. The final judgment awarding the writ in that case was entered by the Circuit court July 10, 1930. It will not be necessary to describe these former proceedings further than to say that McArdle during these years has been employed by the City of Chicago performing the office of a cement tester; that his position was secured under the provisions of the Civil Service act, and that the litigation concerned the attempts of those in authority to unlawfully deprive him of his position. By the judgment entered at the conclusion of that litigation it was ordered and directed that petitioner should be restored and reinstated in his position with all its rights and privileges, and that the City council should appropriate not only for his current salary but also the sum of $32,975 for salary which became in arrears and accrued pending the litigation between the parties.

Appellee,

vs.

CITY OF CHICAGO, a municipal corporation, et al.,

Appellants.

MR. JUSTICE FULTON DELIVERED THE OPINION OF THE COURT.

This appeal is by the City of Chicago, its Mayor and City Clerk from a judgment entered April 12, 1946, ordering, directing the Director of Elections to a petition therefore filed (and determining directing to place by their said Director) carried a mandamus against them as required for on the petition.

This controversy is the second to have not long consisted litigation between the same parties. Ragnotti v. City of Chicago, 374 Ill. App. 142; Ragnotti v. City of Chicago, 392 Ill. App. 142. Petition for certiorari was denied April 8, 1946. This suit was begun by the filing by Ragnotti of an original petition for mandamus on May 11, 1946. The final judgment awarding the writ is that also was entered by the circuit court July 12, 1946. It will not be necessary to describe these terms proceedings further than to say that Ragnotti during their years has been employed by the City of Chicago performing the office of a menial laborer; that his position the received under the provisions of the civil service act, and that the litigation concerned the allegedly of issue in authority to unclassify Ragnotti's job of his position. By the judgment entered at the conclusion of that litigation it was ordered that petitioner should be restored and reinstated in his position with all the rights and privileges, and that the City should accordingly reinstate and make the job effect salary and also the sum of $12,272 for salary which became in arrears and account pending the litigation between the parties.

The judgment also provided that it was adjudged that leave was granted to the petitioner to apply to the court in the future, as the ~~motion~~ occasion might arise or require, for the issue of the peremptory writ of mandamus to any and all future officials of the City of Chicago, as well as the Civil Service commissioners, whose duties might require them to make or participate in the making of appropriations for the salary of this office, or the signing or countersigning of vouchers or warrants for the payment, or the paying of the salary to petitioner so long as he should, after the restoration of petitioner to the honors, duties and responsibilities of the office of cement tester, remain the incumbent of said office.

The present petition was filed October 18, 1932, and is described therein as a "petition for rule on respondents to show cause." The petition set up these former proceedings including the issue by the Circuit court of the peremptory writ of mandamus, its delivery to the sheriff and service of same upon Anton J. Cermak, who was then an alderman and thereafter the mayor, and upon each and every alderman of the city.

The petition further recites that since the entry of the order and the service of the writ, William H. Thompson, then mayor, had ceased to hold the office and Anton J. Cermak was elected his successor, and that other officials and aldermen of the city had been qualified and elected, but that each and all had actual or constructive knowledge of the order of July 10, 1930, and of the peremptory writ of mandamus issued thereunder.

Paragraph 5 of the petition sets up that there is now and has been for a long period past in full force and effect an ordinance of the City of Chicago, which is quoted verbatim as follows:

"The Chicago Municipal Code, 1922. 2826 Uniform salaries within grade. Whenever the Civil Service Commission shall, by rule, have classified offices and places of employment in the city

The judgment also provided that it was adjudged that issue was granted to the petitioner (by mail) to the court in the future, as the occasion might arise or require, for the issue of the peremptory writ of mandamus in any and all future citizenship of the city of Chicago, as well as the civil service commissioners, whose duties might require them to make or participate in the making of appropriations for the salary of civil office, or the signing or countersigning of vouchers or warrants for the payment, or the payment of the salary to petitioner in fact or by law, after the expiration of notification to the clerk, city, and commissioner, one of the office of common law, notice the information of full office.

The primary position was filed October 15, 1898, and is described therein as a "position for which an remuneration is given exists." The petition was in form (which accordingly) the same by the circuit court of the peremptory writ of mandamus, the delivery to the clerk and service of some upon notice ?, through, was the time an alderman and commissioner, and upon each and every alderman of the city.

The petition further recites that since the entry of the order and the service of the writ, William E. Thompson, then mayor, had refused to hold the office and notice ?. Dunnak was elected his successor, and that other officials and aldermen of the city had been qualified and elected, but that none had all had taken or subscribed the oath of office at the entry of the peremptory writ of mandamus issued October.

Paragraph 2 of the petition sets up that there is now and has been for a long period past in full force and effect an ordinance of the city of Chicago, which it quoted verbatim in relevant where the "The Chicago Municipal code, 1911. 2888 Politics salaries within grade. Whenever the civil service commission shall, by rule, make classified officers and places of employment in the city

into classes and grades, and said offices and places shall have been classed according to the general line and character of work involved in the respective duties thereof, and such commission shall have established grades or ranks within each class, each grade or rank comprising offices and places having substantially similar duties, authority and responsibility, appropriations for salaries for all such offices and places of employment within each grade shall be uniform. No salaries shall be paid by the comptroller of City Treasurer for services of any officer or employe unless such person is occupying an office or place of employment according to the provisions of this article and is entitled to payment therefor."

The petition avers that the office to which McArdle was restored by virtue of the order of July 10, 1930, and the writ of mandamus issued in pursuance thereof, was by the Civil Service commission of the City of Chicago pursuant to and in compliance with the Civil Service act, classified as Group A, Grade 5, 11-D-5; that in pursuance of said ordinance of the City of Chicago, through its mayor and city council, did on July 8, 1926, adopt a resolution fixing the salaries of technical engineering employees on and after July 1, 1926, which resolution, so far as it relates to and provides for technical engineering employees in said Group A. Grade 5, 11-D-5, is in the words and figures following:

"A. 1st year.....$4260.00
2nd and 3rd years..... 4400.00
4th and 5th years..... 4620.00
After 5 years..... 4800.00
After ten years of service in position, $10.00 per month additional to be allowed; after five additional years of service, $5.00 per month additional to be allowed; and after five more years of service, $5.00 per month addition to be allowed;"

and that by virtue of this resolution and petitioner's years of service, the salary of petitioner became and he was entitled to receive as salary for the year 1932 the sum of $5040, for which the City council and its members should have appropriated; that for each year subsequent to the passage and adoption of this resolution, with the exception of the appropriation ordinance for the year 1932, the city council of the City of Chicago with the approval of the mayor appropriated for petitioner's salary and the

salaries of all technical engineering employees in Group A, Grade 5, 11-D-5, at the rate fixed by the resolution.

The petition further avers that on June 3, 1932, the finance committee of the city council reported the annual appropriation bill for 1932 as recommended by it and in said report recommended with reference to petitioner's salary, "the following, viz: Inspection and Testing Division. Salaries and Wages. Cement Tester at $5,040.00 per annum..... $3,965.90;" that of this sum $1,074.10 represented a deduction made in part to meet the current depression, and that of this petitioner makes no complaint; that thereafter on June 13, 1932, the city council met for the purpose of adopting an appropriation ordinance, and that the session was presided over by the then Mayor, Anton J. Cermak; that the appropriation bill came before the city council for adoption, and that the said provision with reference to petitioner's salary was modified as follows;

"Inspection and Testing Division.
Salaries and Wages.
Cement Tester for 6 mos. ending June 30,
1932 at $420.00 per month.....$2,010.49;"

and as so amended and modified was adopted; that the effect of this action would have been to legislate petitioner out of his office; that subsequent to the adoption and passage of the appropriation ordinance on June 13, 1932, and on June 18, 1932, the mayor vetoed the appropriation ordinance, stating as his reason therefor, "I am informed that it will be necessary to employ the person in such position for a longer period than is provided for," and further stating, "I therefore recommend that the following be substituted in lieu of the item so vetoed: 'Cement Tester at $420.00 per month to July 1st, 1932, and at $210.00 per month thereafter.....$2938.19';" that the city council adopted the veto and amended the ordinance to conform therewith and the mayor signed the same as amended, thus limiting petitioner's pay to

motion of 11 technical engineering employees in Grade A, scale F, 12-0-F, is the vote filed by the resolution.

The Utilities Tribunal ruling that on June 2, 1972, the finance committee of the city council rejected the annual appropriation bill for 1972 as recommended by it and in full report presented with reference to petitioner's salary, "the following, viz: Inspection and Testing Division. Salaries and Wages. Owner Tester at $2,640.00 per annum..... $2,800.00;" and that on $2,771.12 represented a tentative date in July in lieu the original 1-month, and that at this preliminary date as modified, that therefore on June 13, 1972, the city council had for the purpose of adopting an appropriation ordinance, and said the same plan was presented over to the tenor, viz: Tenor: that the appropriation bill came before the city council for adoption, and that the said provision with reference to petitioner's salary was modified as follows:

"Inspection and Testing Division.
Salaries and Wages.
Owner Tester for 3 mos. ending June 30,
$2[illegible] at $800.00 per month.....$2,[illegible]."

and he so amended and modified was advised: that the effect of this action would have been to legislate petitioner out of his office; that adversely to the interest of the corporation petitioner on June 13, 1972, and on June 13, 1972, the mayor vetoed the appropriation ordinance, stating as the reason therefor, "I am informed that it will be necessary to employ the person in each position for a longer period than is provided for," and further stated, "I therefore recommend that the following be substituted in lieu of the item as vetoed: 'Owner Tester at $800.00 per month to July 1st, 1973, and at $[illegible].00 per month thereafter.....$[illegible];" that the city council adopted the veto and passed the ordinance to establish positions and the mayor signed the same as amended, then limiting petitioner's pay to

$2988.19 per year.

Petitioner says that while the reduction from his salary other than said depression cut may not seem large, yet it is of extreme importance to petitioner, for the reason that he has long since passed the period for retirement on a pension, and to retire under the terms of the ordinance as finally adopted would have the effect of seriously impairing his pension rights; that no official of the city or any other person has given petitioner any reason, cause or excuse for either the action of the city council in passing the appropriation ordinance of June 13, 1932, or by the ordinance of June 18, 1932, the singling out of petitioner from the entire class of Group A, Grade 5, 11-D-5, numbering at the time of the adoption of the ordinance upward of twenty officers and employees, for a salary cut other than the aforesaid depression cut which was common to all officers and employees.

Petitioner avers that the city council with the approval of the mayor did appropriate for all other technical engineering employees in Group A, Grade 5, 11-D-5, in accordance with the resolution of the city council as stated in paragraph 7; that although since his reinstatement he has been the head of and in charge of the division known as "Inspection and Testing Division, Administrative Service Unit, Bureau of Engineering, Department of Public Works, of the City of Chicago," the city council with the approval of the mayor, appropriated in said annual appropriation ordinance for the subordinate employees in said division at a higher and greater rate than is appropriated for petitioner; that by virtue of the ordinance set up in paragraph 5 of the petition and paragraph 7 of the resolution, the salary for the office he holds should be $5040 per annum, and that up to the adoption of the appropriation ordinance of 1932 he received that amount, and he is by virtue of the ordinance of the city, the statutes of

[illegible] per year.

Petitioner says that while the reduction from his salary other than said depression cut may not seem large, yet it is of extreme importance to petitioner, for the reason that on the long close period the period for retirement or a pension, or in lieu either the terms of the ordinance an finally adopted would have the effect of seriously impairing his pension rights; that no official of the city or any other person can give petitioner any reason, cause or excuse for either the action of the city council in passing the aforementioned ordinance of June 12, 1933, or by the ordinance of June 26, 1933, the singling out of petitioner from the entire class of Group A, Grade 3, IIA-3-3, numbering in the [illegible] of the adoption of the ordinance several of twenty officers [illegible], the salary cut given that the [illegible] [illegible] was found in all officers and employees.

Petitioner says that the city council also the mayor of the mayor did approving the all other financial employees in Group A, Grade 3, IIA-3-3, in conformance with the resolution of the city council as stated in paragraph 7; that although since his retirement he has been the head of and in charge of the division known as "Inspection and Testing Division, Administrative Service Unit, Bureau of Engineering, Department of Public Works, of the City of Chicago," the city council with the approval of the mayor, appropriated in said annual appropriation ordinance for the subordinate employees in said division of a higher and greater rate than is appropriated for petitioner; that by virtue of the ordinance set up in paragraph 2 of the petition and paragraph 7 of the complaint, the salary for the office he holds should be $5000 per annum, and that up to the adoption of the appropriation ordinance of 1933 he received that amount, and he is by virtue of the ordinance of the city, the statutes of

the State and the peremptory writ of mandamus issued in this cause, still entitled to receive $5040 for the year 1932 and thereafter. He also avers that the aldermen of Chicago, the city council and the mayor took this action for the purpose of circumventing the order of July 10, 1920, and the writ of mandamus issued in pursuance thereof, and for the further purpose of embarrassing petitioner in his office and of excluding him from the honors, duties and responsibilities thereof.

The prayer of the petition is that respondents, naming them, should show cause why the court should not issue its peremptory writ of mandamus against them; that they should be required to appropriate petitioner's proper salary and when appropriated pay the same to petitioner.

The petition was verified by the oath of petitioner to the effect that the petition was true in substance and in fact. To this petition defendants filed a general and special demurrer on October 26, 1932, and certain paragraphs of the petition which have not been recited in substance or otherwise in this opinion were ruled out upon a hearing of the demurrer. With these paragraphs stricken out, the demurrer was overruled and defendants electing to abide by their demurrer, the judgment for a mandamus as prayed was entered, and from that order this appeal has been perfected.

We acknowledge some difficulty in determining the theory upon which defendants prosecute this appeal. The brief points out that the statement of the law as appears in the opinion in the McArdle case (216 Ill. App. 343), following the law as laid down in People ex rel. Blachley v. Coffin, 279 Ill. 401, to the effect that there was no obstacle to the granting of complete relief in one proceeding in actions of this character; and that plaintiff could obtain reinstatement, as well as judgment for his salary, has been overruled in the later case of People ex rel. Durante v. Burdett,

The State and the petitioner with of mandamus issued in this cause, which entitled to receive $5040.00 for the year 1942 was discontinued.

It also appears that the unknown of Chicago, the city council and the mayor took this action for the purpose of circumventing the order of July 13, 1942, and the writ of mandamus issued in petitioner Warren, and for the further purpose of substantially depriving the affiant and of enjoying his from the benefits, rights and privileges thereof.

The purpose of the petition is that permanently, treating that, should just cause why the court should not issue its peremptory writ of mandamus against them, that they should be required to appropriate petitioner's proper salary and when appropriated pay the same to petitioner.

The petition was verified by the oath of petitioner to the effect that the petition was true in substance and in fact. In this petition defendants filed a general and special demurrer on October 28, 1942, and certain paragraphs of the petition which have not been treated in substance or otherwise in this opinion were ruled upon a hearing of the demurrer. With these paragraphs stricken out, the demurrer was overruled and defendants elected to abide by their demurrer, the petition was a mandamus as prayed was entered, and from that order, this appeal has been perfected.

The substantial, non-fictitious, in determining the issues upon which jurisdiction presents this appeal. The brief points out that the statement of the law as appears in the opinion in the Ex parte case (114 Ill. App. 324), relating the law as this case in People ex rel. Hawkins v. Cutler, 320 Ill. 401, to the effect that there was no grounds to the granting of complete relief in mandamus proceeding in matters of this character, and that plaintiff could obtain relief, as well as judgment for his salary, has been overruled in the later case of People ex rel. Turner v. Thompson,

283 Ill. 124, followed in Mittell v. City of Chicago, 327 Ill. 443, and O'Connor v. City of Chicago, 327 Ill. 586. We are not able to discern how this could in any way destroy or impeach the validity of the original judgment entered in the McArdle case, which certainly settled all the rights of the parties up to the time of its rendition.

Defendants also point out section 2 of article 6 of the Cities and Villages act, which in substance provides that the city council may in its discretion by ordinance passed by a vote of two-thirds of the aldermen, provide for the election of certain officers, and may by a like vote by ordinance or resolution, to take effect at the end of the fiscal year, "discontinue any office so created, and devolve the duties thereof on any other city officer; and no officer filling any such office, so discontinued, shall have any claim against the city on account of his salary after such discontinuance."

All this, as it seems to us, is water which has gone over the dam, the rights of these parties having been fully adjudicated in a long continued litigation before courts having jurisdiction of the parties and the subject matter.

Defendants also contend (upon what theory we are unable to understand) that enforcement of this judgment imperils the independence of one of the three departments of government as provided for by the constitution of the state. If it was supposed that the constitutional questions were involved, the appeal should not have been taken to this court. We think the record shows that all the rights of the parties have been heretofore adjudicated, and that the petitioner was clearly entitled on the facts admitted by the demurrer to the relief which he obtained by the judgment from which defendants appeal. The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

See 111. 121, followed in Willis v. City of Chicago, 267 Ill. 419, and O'Connor v. City of Chicago, 267 Ill. 562. We are not sure in cases like this would in any way destroy or impair the validity of the original judgment entered in the Quarles case, which certainly settled all the rights of the parties as to the time of its rendition.

Defendants also point out section 1 of article 2 of the Illinois and Illinois act, which in substance provides that the city council may in its discretion by ordinance passed by a vote of two-thirds of the aldermen, provide for the division of certain offices, and may by a like vote by ordinance or resolution, in case either at the end of the fiscal year, "abolishes any office so created, and revives the duties attached to any other city officer; and so officer Illinois not such office, in discretion, shall have any claim against the city on account of his salary after such abolishment."

All this, as it seems to us, is other which has been over the days the rights of these parties after the fully adjudicated in a long continued litigation before courts during jurisdiction of the parties and the subject matter.

Defendants also contend (upon what theory we are unable to understand) that notwithstanding if this judgment invalid the ordinance if one of the terms improvements of government as provided for by the constitution of the state. It is not suggested that the constitutional questions were involved, the appeal should not have been taken to this court. To claim the record shows that all the rights of the parties have been properly adjudicated, and that the ordinance was clearly entitled as the first amended by the decision to the relief which he obtained by the judgment from which defendants appeal. The judgment is therefore affirmed.

AFFIRMED.

O'Connor and Walsh, JJ., absent.

143

36977

ANTOINETTE KOTEL,
Defendant in Error,

v.

WALTER J. KOTEL,
Plaintiff in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

272 I.A. 625

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ, respondent-defendant, against whom his wife, Antoinette obtained a decree of divorce with alimony for his fault, seeks to reverse an order committing him for contempt.

An inadequate abstract shows the filing of a petition to show cause, an answer by respondent, a commitment order, a petition by respondent for reconsideration thereof and an order denying reconsideration. There is nothing in the abstract showing any of the actual facts which were made to appear to the court on the hearing. A certificate of evidence purporting to show the proceeding has heretofore been stricken. The only error assigned and argued is that "the trial court erred in refusing to allow the plaintiff in error to introduce proof showing that he did not wilfully refuse to comply with the order or decree of the Circuit court of Cook County." Manifestly, upon such a record, the contention of respondent cannot be sustained, and the order is therefore affirmed.

AFFIRMED.

McCurely and O'Connor, JJ., concur.

[illegible]

[illegible]

[illegible]

36749

FLORENCE D. CROSTHWAIT et al.,
Appellants,

vs.

HARRY L. STREET et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

144 F

272 I.A. 625

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainants filed their bill, alleging that they were the two nieces and nephew of Charles Russell Switzer, deceased, and that they were entitled to recover the entire estate formerly belonging to him and which they allege was obtained by Harry L. Street, one of the defendants, by a deed and a will fraudulently procured by him while in a fiduciary relationship with Switzer, who was mentally enfeebled and entirely dominated by Street; they asked that the deed to Street be set aside and the will declared void and that they recover the real estate and all the property Street claimed under the will.

Defendants filed special pleas in bar, asserting that all the matters claimed by the bill had been adjudicated in Florida against the complainants; these pleas were allowed by the chancellor and complainants filing no replication the bill was ordered dismissed for want of equity. Complainants have appealed to this court.

The bill of complaint is lengthy, covering nearly eighty pages of the abstract. The essential allegations are that Switzer was the owner of all the property involved; that he died June 27, 1928, aged eighty years, while a resident of Winter Park, Florida, where he had practiced osteopathy with financial success; in 1875 his sister married James G. Darling, and complainants are the children of this marriage. The bill recites in detail instances tending to show that Darling supported the Switzer family while they lived in Evanston, Illinois, and gave them financial assistance.

ALBERT S. DARTELLY et al.,
Appellants,

vs.

ALBERT S. DARTELLY et al.,
Appellees.

Appeal from Circuit Court
of Cook County.

Mr. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

Complainants filed their bill, claiming that they were the heirs and owners of Charles Parnell Dartelly, deceased, and that they were entitled to receive the entire estate formerly belonging to him and which they allege was obtained by Harry L. Dartelly, one of the defendants, by a fraud and a will fraudulently executed by him while in a financially embarrassed condition, who was mentally unbalanced and entirely dominated by Harry, that method that the deed to Harry be set aside and the will declared void and that they receive the real estate and all the property Harry claimed under the will.

Defendants filed several pleas in bar, asserting that all the matters claimed by the bill had been adjudicated in Florida against the complainants; these pleas were filed by the chancellor and complainants filing no replication, the bill was ordered dismissed for want of equity. Complainants have appealed to this court.

The bill of complaint is lengthy, covering nearly eighty pages of the abstract. The essential allegations are that Michael was the owner of all the property involved; that he died June 27, 1920, aged eighty years, while a resident of Winter Park, Florida, where he had practiced osteopathy with financial success; in 1875 his father married Tamse S. Dartelly, and complainants are the children of this marriage. The bill recites in detail instances tending to show that Dartelly supported the Dartelly family while they lived in Evanston, Illinois, and gave them financial assistance.

Switzer moved to Florida in 1880 and thereafter resided there; with the aid of Darling he acquired a tract of land near Winter Park, Florida, which adjoined a tract Darling had previously purchased; Darling later deeded his tract to Switzer's wife; both pieces of real estate were occupied by Switzer as his residence until his death. Switzer's wife was a sister of Charles A. Street, who was the father of Harry L. Street, one of the defendants.

The Switzers had no children. For a time Switzer advised with his brother-in-law, Charles A. Street, who was a successful lumberman, with reference to business matters, but as Charles Street grew older Switzer consulted his son Harry, who was engaged in the lumber business with his father; the bill alleges that Harry Street so deported himself as to create in Switzer's mind the highest degree of confidence in Street's ability, and that after the death of Mrs. Switzer, Dr. Switzer was susceptible to the influence of Harry Street.

On April 30, 1926, Dr. Switzer made a will in which, after making various gifts, he left his real estate, including his homestead, to his "nephew Harry L. Street," who was also made the residuary legatee; in September, 1926, Switzer deeded the real estate to Street; June 27, 1928, Dr. Switzer died; September 25, 1928, the will was admitted to probate in the probate court of Orange County, Florida, (called "Court of County Judge") where deceased had lived, and on the same day letters testamentary were ordered to issue to Harry L. Street, the executor named in the will.

Subsequently a petition was filed in the probate court as authorized by the Florida statute by Charles G. Darling, one of the complainants herein, to contest the will on grounds of mental incapacity of Dr. Switzer and of undue influence exercised by Harry L. Street. The petition asked that the probate of the will be revoked and that it be declared null and void; March 10, 1931, after hear-

Switzer moved to Florida in 1880 and thereafter resided there; with the aid of Durling he acquired a tract of land near Winter Park, Florida, which adjoined a tract Durling had previously purchased; Durling later deeded his tract to Switzer's wife; both pieces of real estate were occupied by Switzer as his residence until his death. Switzer's wife was a sister of Charles A. Street, who was the father of Harry L. Street, one of the defendants.

The Switzers had no children. Two of their sisters survived with their brother-in-law, Charles A. Street, who was a successful businessman, with interests in business activity, but as Charles Street grew older Switzer assumed his care. Harry, who was living in the Switzer household with his father, the will alleges that Harry Street exercised himself to the extent in Switzer's mind the alleged defects of testimony in Switzer's behalf. Not long after the death of Switzer, Dr. Switzer was susceptible to the influence of Harry Street.

On April 30, 1924, Dr. Switzer executed a will in which, after making various gifts, he left his real estate, including his homestead, to his nephew Harry L. Street. The was later made the subject of a separate trial; in November, 1924, Switzer deeded the real estate in question; then on, with, Dr. Switzer died September 21, 1924, the will was admitted to probate in the probate court of Orange County, Florida, (called "Court of County Judge") where decedent had lived, and on the same day Lytton Gustamsky were appointed to issue to Harry L. Street, the executor named in the will.

Subsequently a petition was filed in the probate court on authorized by the Florida statute by Charles G. Durling, one of the complainants herein, to contest the will on grounds of mental incapacity of Dr. Switzer and of undue influence exercised by Harry L. Street. The petition asserted that the probate of the will be revoked and that it be declared null and void; Harry L. Street, after some

ing, the court entered an order denying the petition of Darling. Motions for a rehearing and a new trial were made and denied, and Darling thereupon prayed an appeal, in accordance with the Florida statute, to the Circuit court of Orange county, which appeal was subsequently dismissed by that court.

Darling then made a motion in the Circuit court to vacate the probate of the will and all orders with reference thereto made by the probate judge on the ground that said judge never had any jurisdiction over the estate of Dr. Switzer because the application for letters presented by Street was not lawfully sworn to, and because said will named him as the principal legatee and also nominated him to be the executor thereof, contrary to the statutes of Florida. The Circuit court denied this motion. The contestants filed a motion before the Circuit court for a rehearing, which was still pending; at the same time they filed in the probate court a petition to vacate the probate and all orders with reference thereto on the ground that the probate court lacked jurisdiction; after a hearing on this motion the petition was denied by the probate court and it was ordered that all the orders in the cause theretofore made should stand affirmed.

The instant bill alleges various errors in the orders of the probate court and of the Circuit court.

The bill prayed for an accounting; that the property formerly belonging to Dr. Switzer be delivered to the complainants; that the daughter of Harry L. Street, who inherited from her father, since deceased, be compelled to convey the real estate to these complainants; that all persons having property taken from Switzer through Street's frauds deliver the same to complainants; that this court adjudge that the application of Street for letters testamentary was not in accordance with the law of Illinois, and adjudge that the omissions in the probate proceedings should invalidate all orders

ing, the court ordered an order denying the petition of Darling. Motions for a rehearing and a new trial were made and denied, and Darling thereupon prayed an appeal, in accordance with the Florida statute, to the Circuit court of Orange county, which appeal was subsequently dismissed by that court.

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The instant bill alleges various errors in the orders of the probate court and of the Circuit court.

The bill prays for an accounting; that the property formerly belonging to Dr. Switzer be delivered to the complainants; that the daughter of Harry L. Street, who inherited from her father, since deceased, be compelled to convey the real estate to these complainants; that all persons having property belonging from Switzer through Street's fraud deliver the same to complainants; that this court adjudge that the application of Street for letters testamentary was not in accordance with the law of Illinois, and adjudge that the assessions in the probate proceedings should invalidate all orders

made by the Florida court; that the adjudication by the Florida court that the will was valid and admitted to probate with Street as the authorized executor, is null and void, and that all of the proceedings with relation to the will in Florida are wholly void. This court is also asked to enjoin the representatives of the estate of Harry L. Street from bringing the appeal pending in the Circuit court of Orange county, Florida, to a final hearing, and that all the legatees under the will of Dr. Switzer and all of the solicitors and attorneys residing in Florida be enjoined from proceeding under the probate orders or other orders in the courts of Florida.

The defendants in five special pleas asserted many of the facts appearing in the bill, namely, the death of Dr. Switzer, leaving a last will and testament, and its probate in the probate court of Orange county, Florida; that on July 24, 1928, Florence D. Crosthwait, one of the complainants herein, filed in the Florida court a caveat to the will; that upon a hearing of the petition filed by Darling to set aside the probate, the testimony and depositions were taken of Harry L. Street and all of the complainants herein, and many other witnesses; that the Florida court denied the petition and held the will to be the true last will and testament of Dr. Switzer, which disposed of all his property. The pleas further asserted, in substance, that the matters alleged in the bill had been adjudicated in the courts of Florida, and that for the Superior court of Illinois to assume jurisdiction would be violative of the comity existing between courts and of article 4, section 1, of the Constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; also, that the real estate which complainants seek to recover is located in Florida and that the Superior court has no jurisdiction

made by the Florida court; that the adjudication by the Florida court that the will was valid was entitled to receive full faith as the authoritative document, in well and valid, and that all of the proceedings with relation to the will in Florida are wholly void. This court is also asked to enjoin the representatives of the estate of Harry L. Street from taking the appeal pending in the circuit court of Orange county, Florida, to a final hearing, and that all the legatees under the will of Dr. Weisner and all of the solicitors and attorneys residing in Florida be enjoined from proceeding under the probate errors or other orders in the courts of Florida.

The defendants in five separate pleas asserted many of the facts appearing in the bill, namely, the death of Dr. Weisner, leaving a last will and testament, and its probate in the probate court of Orange county, Florida; that on July 31, 1919, Clarence T. Crawford, one of the complainants herein, filed in the Florida court a caveat to the will; that upon a hearing of the petition filed by Darling to set aside the probate, the testimony and depositions were taken of Harry L. Street and all of the complainants herein, and many other witnesses; that the Florida court denied the petition and held the will to be the true last will and testament of Dr. Weisner, which disposed of all his property. The plea further asserted, in substance, that the matters alleged in the bill had been adjudicated in the courts of Florida, and that the Superior court of Illinois to assume jurisdiction would be violative of the mandatory provisions supra and of article 4, section 1, of the Constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; also, that the real estate which complainants seek to recover is located in Florida and that the Superior court has no jurisdiction

to determine the question of the title.

The bill makes allegations of assistance rendered to Dr. Switzer by James S. Darling, father of complainants, and that these complainants inherited an interest in Switzer's estate through their father's advances of money to him. The bill does not allege any contract or agreement tending to support any claim of Darling. Furthermore, if Darling had such a claim, it passed at his death to his executor or administrator, who are not parties to the instant bill. While the bill shows that the complainants were importuning Dr. Switzer for money for some time before his death, there is no allegation that the father of complainants ever made any claim against Switzer on account of advances. Also, there are no facts alleged which would show any liability on the part of defendant Street on account of any prior advances made by Darling to Switzer.

The principal question presented is whether the Florida court had jurisdiction to determine the validity of the will. The only real estate involved is in Orange County, Florida, and the tangible personal property is also there. The only property outside the state are stocks, bonds, and like intangibles. As we have seen, Dr. Switzer had resided in Florida for thirty-eight years prior to his death. Under such circumstances, the validity of his will is solely to be determined by the courts of Florida. The place of the decedent's last domicile determines the probate jurisdiction and the supervision of the settlement of his estate. 23 Corpus Juris, 1016. And this is true even if the personal property is located in another State. 15 Corpus Juris, 822. In Pratt v. Hawley, 297 Ill. 244, the decedent, residing in Clark county, Ohio, left property in that state and also a farm in Illinois; the will was probated in Ohio under the law of that state, which provided for notice to the next of kin if resident

in the state; the nephew, next of kin, lived in Chicago and received no notice; a copy of the will was filed in this state, together with an order of the Ohio court admitting the same to probate, and the will was admitted to probate here; the nephew, whose devise had been taken away by codicil, appealed to the Circuit and the Supreme courts, asserting the unconstitutionality of the Illinois statute which provides for giving effect to wills probated in another state, as it attempted to make a judicial proceeding in a foreign state conclusive upon a person who was not a party to it. The Supreme court held against this position, saying that the full faith and credit provision of the Federal Constitution includes proceedings in Probate courts, "and that provision requires that the judicial proceedings in the Probate court of Ohio shall be given such faith and credit as they have by law and usage in the courts of that state." See also Balsewicz v. C. B. & Q. R. R. Co., 240 Ill. 338, and Ramsay v. Ramsay, 196 Ill. 179. In Davis v. Upson, 209 Ill. 206, and 230 Ill. 327, it was held that a court of chancery in Illinois had no jurisdiction to set aside the probate in Illinois of the will of a resident of New York, saying:

"If the decision of the court of the domicile of a deceased person does not control in the matter of whether the deceased died testate or intestate, there must necessarily result a multitude of decisions upon that question, and if a devisee may carry a will from State to State and present it for probate in each State where the decedent had a debt due him at the time of his death, until he can find a State under the laws of which it can be admitted to probate, great confusion in the settlement of estates would follow."

See also Headen v. Cohn, 292 Ill. 210.

It follows from these considerations that the Probate court of Orange county, Florida, where Switzer lived, having taken jurisdiction, no other court can oust it. The property of the decedent wherever situated, including the intangibles in Illinois, have their situs in Florida. When personal or movable property is the subject of the bequest in a will, the validity of the will is to be determined by the laws of the domicile of the decedent without

in the state; the mother, next of kin, lived in Chicago and received no notice; a copy of the will was filed in this state, together with an order of the Ohio court admitting the same to probate, and the will was admitted to probate here; the decision, since decision had been taken away by codicil, appealed to the Illinois and the Supreme Court, assuming the constitutionality of the statute which provides for giving effect to wills probated in another state, as it attempted to take a judicial proceeding in a foreign state conclusive upon a person who was not a party to it. The Supreme Court held against this contention, saying that the full faith and credit provision of the Federal constitution includes proceedings in probate courts, "and that provision requires that the judicial proceedings in the Probate court of Ohio shall be given such faith and credit as they have by law and usage in the courts of that state." See also Hagenlocker v. C. & A. R. R. Co., 98 Ill. 578, and Turner v. Turner, 98 Ill. 147. In Curtis v. Hoover, 309 Ill. 308, and 320 Ill. 327, it was held that a court of chancery in Illinois had no jurisdiction to set aside the probate in Illinois of the will of a resident of New York, saying:

"If the decision of the courts of the domicile of a deceased person does not control in the matter of whether the deceased died testate or intestate, there must necessarily result a multitude of decisions upon that question, and if a devisee and party a will from their to state can present it for probate in each state where the decedent had a debt due him at the time of his death, until he can find a state under the laws of which it can be admitted to probate, great confusion in the settlement of estates would follow."

See also Hagen v. Lane, 247 Ill. 320.

It follows from these considerations that the Probate Court of Cook County, Illinois, where Walker lived, having jurisdiction, no other court can oust it. The property of the decedent wherever situated, including the intangibles in Illinois, here their situs in Illinois. Even personal or mobile property is the subject of the request in a will, the validity of the will is to be determined by the law of the domicile of the decedent without

regard to the law of the place where the personal property may be found. Davis v. Upson, supra; Fenwick v. Farman, 332 Ill. 223; Harris v. Chicago Title & Trust Co., 333 Ill. 245; First National Bank v. Maine, 284 U. S. 312; Farmers Loan Co., 230 U. S. 204.

Under the Florida statute, section 5757, a contest of a will is not by bill in chancery but by petition in the probate court. Complainants argue alleged errors in these proceedings. It is said that when Street presented the will and asked for probate there was no certificate of magistracy attached to his affidavit. By subparagraph 2, paragraph 4569, Florida statutes, it is provided that an oath in another state can be administered by a notary public and no certificate of magistracy is required. Furthermore, the Florida court named a commissioner to take the affidavits, and the individual taking them derives his power from his appointment as commissioner and not from the fact that he was also a notary public. See Peaby v. Brunt Pottery Co., 239 Ill. 540, and Kendall v. Limberg, 69 Ill. 355.

The statute of Florida, section 5472, provides that wills may be admitted to probate on the oath of any person appointed executor, or, where the executor is interested in the estate bequeathed, of any other credible person having no interest under the will. It is contended that Street, who swore to the petition to probate the will, was also appointed executor - hence the probate was in violation of the statute. That Street made the oath attached to the petition is not a jurisdictional defect. The will was not admitted to probate upon his oath but upon the oath of the two subscribing witnesses not interested in the estate. Upon appeal to the Circuit court of Orange county, Florida, the point was raised that the proceedings in the probate court were void because of the form of the oath, but the Circuit court held that the probate court had properly exercised its jurisdiction. Furthermore, in Robinson v. Ewing, Bellas & Co., 24 Fla. 237, the Supreme court of Florida has held

regard to the law of the place where the personal property may be found. Davis v. Davis, supra; Lewis v. Lewis, 200 Ala. 349; Harris v. Hilmer Fitts & Trust Co., 180 Ala. 600; Ex parte Anderson; Smith v. Smith, 204 N. C. 817; Somerset Land Co., 200 N. C. 282.

Under the Florida statute, supra, a citizen of a state is not by fact in domicary but by residence in the probate court. Complainants argue alleged error in these proceedings. It is said that when Estes presented his will and asked for probate there was no specificate of magistrate attached to the affidavit. Cf. Ann. Statutes F. 1944 Ch. 731. Florida statutes, it is contended that an will in another state can be administered by a notary public and no certificate of magistrate is required. Nevertheless, the Florida court based a conclusion in part on affidavits, and the majority taking from further his point from the affidavits to consideration and not from the fact that he was then a notary public. Ex parte Estes, Estate Fairbrs Co., 270 Ala. 240, and Cassell v. Lancaster, 20 Ala. 433.

The statute of Florida, supra, 731, provides that wills may be admitted to probate on the oath of any person acquainted with author, or, where the executor is interested in the estate determined, of any other credible person having no interest under the will. It is contended that Estes, who appears in the petition to probate the will, was also appointed executor - hence the probate was an violation of the statutes. That Estes made the oath attached to the petition is not a jurisdictional defect. The will was not admitted to probate upon his oath but upon the oath of the two subscribing witnesses not interested in the estate. Upon appeal to the Circuit court of Orange county, Florida, the jury and related that the proceedings in the probate court were void because of the form of the oath, but the Circuit court held that the probate court had properly exercised its jurisdiction. Furthermore, in Robinson v. Dunlap, Dallas & Co., 24 Fla. 377, the Supreme court of Florida has said

that no affidavit of a petitioner is needed in probating a will. All that is needed is the proof of the attesting witnesses.

In their reply brief complainants for the first time suggest the point that Florence D. Crosthwait, one of the complainants, on July 24, 1926, filed in the probate court of Florida a caveat to the will, hence under the statute, section 3602, the probate judge could not admit the will to probate until he has given at least "ten days' notice to the Caveator." It is not shown that proper notice was not given and we must therefore assume that the court proceeded according to the statute. Furthermore, upon the hearing of the petition to set the will aside, all of the complainants, including Florence D. Crosthwait, appeared and gave testimony.

It is well established that full faith and credit must be given in each state to the judicial proceedings of every other state. Article 4, section 1, United States Constitution. The Superior court of Cook county has no jurisdiction to declare the acts of the Florida court to be a nullity and to set aside orders upheld by that court. Chicago Life Ins. Co. v. Cherry, 244 U. S. 26; Pratt v. Hawley, 297 Ill. 244; Attwood v. Buck, 113 Ill. 368; Spencer v. Langdon, 21 Ill. 192; Christiansen v. King County, 239 U. S. 356; Gill v. Kelsey, 207 U. S. 43; Broderick's Will, 88 U. S. 503. In this latter case the court said: "Wherever the power to probate a will is given to a probate or surrogate's court the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court."

It having been decided by the Florida court of probate and by the Circuit court on appeal that the probate court had jurisdiction and that its judgment in finding the will to be the true will of Dr. Switzer was correct, the conclusion of these courts cannot be collaterally attacked. 15 Corpus Juris, 734; Chicago Life Ins. Co. v. Cherry, supra. In this state it has been repeatedly held

that no affidavit of a petitioner is needed to probate a will. All that is needed is the proof of the attesting witnesses.

In their reply brief complainants for the first time suggest the point that Florida G. Crosbywell, one of the contestants, on July 24, 1928, filed in the probate court of Florida a caveat to the will, based under the statute, section 5811, "no probate issue shall not affect the will to probate until it has first to have the caveat made notice to the Caveator." It is not shown that proper notice was not given and we not understand whether that not when involved anything in the record. Furthermore, upon the hearing of the matter on the will caveat, all of the contestants, including Florida G. Crosbywell, appeared and gave testimony.

It is well established that full faith and credit must be given in each state to the judicial proceedings of every other state. Article 4, section 1, United States Constitution. The superior court of each county has no jurisdiction to declare the acts of the Florida court to be a nullity and to set aside orders made by that court. Mulvane Life Ins. Co. v. Sharpe, 94 U. S. 36; Field v. Gibbs, 17 Fed. 844; Wood v. Jones, 112 Ill. 268; Hughes v. Thomas, 21 Ill. 149; Burtelmann v. Ohio Court, 94 U. S. 324; Pike v. Ryder, 6 N. H. 47; Pennoyer v. Neff, 95 U. S. 714. In this latter case the court said: "Whenever the power to probate a will is given to a probate or surrogate's court the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be disturbed in any other court."

It having been decided by the Florida court of probate and by the circuit court on appeal that the probate court had jurisdiction and that its judgment in finding the will to be the true will of Dr. Bulmer was correct, the consideration of these courts cannot be collaterally attacked. 21 Corpus Juris, 371, Judgments, Sec. 1, Chapter, Point. In this state it has been repeatedly held

that where the questions of jurisdiction have been raised in the sister state and there adjudicated, such decision is res adjudicata. Blakeslee v. Blakeslee, 213 Ill. App. 168; Van Matre v. Conkey, 148 Ill. 536.

The pleas filed by defendants properly raised such defenses as show that defendants should not be compelled to answer. Sharp v. Sharp, 328 Ill. 564. Complainants filed no replication, and when the pleas were heard and held to state a complete defense, the bill was properly dismissed. Ferry v. U. S. School Furniture Co., 232 Ill. 101; Rubin v. Kohn, 344 Ill. 166; Kircher v. Hamill, 239 Ill. App. 496.

We have not attempted to note all the points made in the briefs or upon the oral argument presented by counsel for complainants. We have confined ourselves to the affirmative reasons for our conclusion. The order of the chancellor allowing the pleas was proper, and complainants having elected not to file a replication but to stand by their second amended and supplemental bill of complaint, it was properly dismissed.

The decree of the Superior court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

that where the questions of jurisdiction have been raised in the minor state and there adjudicated, such decisions do not preclude. Blackwelder v. Dingmans, 113 Ill. App. 3d; Van Sickle v. Cantor, 148 Ill. 476.

The pleas filed by defendants properly raised such defenses as show that defendants should not be compelled to answer. Ginsburg v. Ginsburg, 320 Ill. 484. Complainants filed no replication, and when the pleas were heard and held to state a complete defense, the bill was properly dismissed. Ekert v. G. C. Dental Supplies Co., 334 Ill. 493; Dalle v. Dahn, 344 Ill. 494; Kaufman v. Gandil, 358 Ill. 490, 494.

We have not attempted to note all the points made in the briefs of both the trial attorneys practiced in general for complainants. We have confined ourselves to the affirmative reasons for our conclusion. The order of the chancellor dismissing the plaintiffs' bill is hereby affirmed.

The costs of the chancellor taxed in affirmed.

AFFIRMED.

Matthews, P. J., and O'Connor, J., concur.

36821

HAMILTON INVESTMENT COMPANY,
a Corporation,
Appellant,

vs.

SARA HICKEY McKINLEY and CATHERINE HICKEY and ALBERT J. HORAN, Bailiff of the Municipal Court of Chicago,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

272 I.A. 626

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff suffered an adverse judgment upon trial by the court of an action of trespass on the case, from which it appeals. The defendants do not appear in this court to defend the judgment. The suit was to recover the value of sixteen linotype magazines which plaintiff says belong to it and which defendants, who had possession of them, refused to turn over to plaintiff.

The evidence shows that two of the defendants, Sara Hickey McKinley and Catherine Hickey, distrained for rent against Craftsmen Printers, Inc.; the sixteen linotype magazines were included in the inventory made by the distrainers in connection with their distress proceedings; they had judgment and an execution was issued to Albert J. Horan, Bailiff of the Municipal court of Chicago, who levied on certain goods purporting to be the property of Craftsmen Printers, Inc., and included in the levy were the sixteen linotype magazines in question. Plaintiff filed a claim in the Municipal court asserting right of property in these linotype magazines in itself and asking for their return; plaintiff there asserted that it was the owner of the linotype magazines as the holder of a chattel mortgage conveying them to it; judgment was entered in this suit finding the right of property to be in plaintiff, and it thereupon demanded of defendants that they turn over the magazines to it. Repeated demands were made upon defendants but they failed to deliver the magazines to plaintiff.

Next

ELECTRIC INVESTMENT COMPANY,
a Corporation,
Appellant,

vs.

JOHN BIGGY MATTHIAS and ALEXANDER
FIELDS and ALBERT A. BURNS, Sheriff
of the Municipal Court of Chicago,
Appellees.

MR. JUSTICE MARTIN DELIVERED THE OPINION OF THE COURT.

PLAINTIFF BRIGHT, an alleged lienholder, upon trial by the court of an action of trespass on the case, from which it appeals. The pleadings do not appear in this court to defend the judgment. The only one to preserve the value of chattels Electric Equipment which plaintiff made bailee to it and which defendants, who had possession of them, replaced in such case are plaintiff.

The evidence shows that in of the defendants, one Harry Ashley and Catherine Ashley, distributed for some against Lorraine Company, Inc.; the electric lighting machines were delivered in the laundry made by the defendants in connection with their lease arrangements; but plaintiff had no knowledge was issued to Albert A. Burns, Sheriff of the municipal court of Chicago, who levied on certain goods purporting to be the property of Lorraine Products, Inc., and included in the levy were the electric lighting machines in question. PLAINTIFF filed a claim in the municipal court asserting right of property in these lighting machines in itself and asking for their return; plaintiff there asserted that it was the owner of the lighting machines by virtue of a chattel mortgage conveying them to it; judgment was entered in this suit finding the right of property to be in plaintiff, and it therefore was discharged of defendants from any further claim to it. Repeated demands were made upon defendants and they failed to deliver the machines to plaintiff.

The evidence supports plaintiff's claim that it was entitled to the possession of the goods in question. It does not seem to be denied that the sixteen linotype magazines were on the premises at time of the distrain for rent and were included in the inventory, and that they were also levied on by the bailiff and included in his inventory. There is no evidence as to what became of these magazines and we do not find any explanation in the record. The burden was undoubtedly upon defendants to account for their disappearance. The presumption therefore is that the linotype magazines were removed either by defendants themselves or someone authorized by them. Cuming v. Wood, 44 Ill. 416; Schaefer v. Washington Safety Deposit Co., 281 Ill. 43.

As the case was tried by the court and as no defense has appeared, the only question remaining is the amount of damages. Plaintiff claimed the linotype magazines were worth $100 each. One witness for plaintiff valued them at $190 each, while another witness valued them at $75 each. Witnesses for defendants gave a lower value. We are of opinion that $75 each was well within the scope of the testimony and judgment will be awarded upon that basis, which, for the sixteen linotype magazines, is $1200. Judgment for that amount in favor of plaintiff will be entered in this court.

JUDGMENT REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE FOR PLAINTIFF.

Matchett, P. J. and O'Connor, J., concur.

FINDING OF FACTS.

We find as facts that plaintiff was entitled to possession of the sixteen linotype magazines; that they were in possession of defendants; that although requested they refused to deliver the same to plaintiff; that the value of the linotype magazines is $75 each, and that the total amount which plaintiff is entitled to recover for the sixteen linotype magazines is $1200.

The evidence supports plaintiff's claim that it was entitled to the possession of the goods in question. It does not seem to be denied that the sixteen linotype magazines were on the premises at time of the distrain for rent and were licensed in the inventory, and that they were also levied on by the bailiff and included in his inventory. There is no evidence as to what become of these magazines and we do not find any explanation in the record. The burden was undoubtedly upon defendants to account for their disappearance. The presumption arises in that the linotype magazines were removed either by defendants themselves or someone authorized by them. Cooley v. Hood, 44 Ill. 414; Hubbard v. Farmington Safety Deposit Co., 88 Ill. 42.

As the case was tried by the court and as no defense has appeared, the only question remaining is the amount of damages. Plaintiff claimed the linotype magazines were worth $100 each. The witness for plaintiff valued them at $100 each, while another witness valued them at $75 each. Witnesses for defendants gave a lower value. We are of opinion that $75 each can well stand the scope of the testimony and judgment will be rendered upon that basis, which, for the sixteen linotype magazines, is $1200. Judgment for that amount in favor of plaintiff will be entered in this court.

JUDGMENT REVERSED WITH DAMAGES AS ABOVE.
JUDGMENT OVER FOR PLAINTIFF.

Matchett, P. J. and O'Connor, J., concur.

FINDING OF FACTS.

We find as facts that plaintiff was entitled to possession of the sixteen linotype magazines; that they were in possession of defendants; that although requested they refused to deliver the same to plaintiff; that the value of the linotype magazines is $75 each, and that the total amount which plaintiff is entitled to recover for the sixteen linotype magazines is $1200.

36917

146

BOULEVARD BRIDGE BANK, a Corporation,
Defendant in Error,

vs.

TELEPHONE SECRETARIAL SERVICE, INC.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

17

272 I.A. 626

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of a judgment against it for $690.45, entered upon a finding of the court without a jury. The action was upon a promissory note purporting to be signed by the defendant to the order of plaintiff, containing a power of attorney to confess judgment; judgment was previously entered by virtue of this power of attorney but upon petition filed by the defendant it was vacated and the case was tried upon its merits, with the resulting judgment as stated. The note is dated June 5, 1931, to the order of plaintiff for $600, seven per cent interest, and is signed:

"Telephone Secretarial Service Inc.
By Hugo L. Goetz, Pres. & Treas."

Defendant denied the authority of Goetz to sign the note.

Much of the briefs of both counsel is devoted to a wordy controversy as to the facts which are said to be contained in a stipulation prepared over a year after judgment was entered and which is signed by respective counsel and marked approved by the trial Judge. It was also stipulated that photostatic copies may be made of all exhibits introduced on behalf of the plaintiff, and that the original stock book and the original minute book of the defendant shall be made part of the record. We shall not attempt to point out the errors in the respective statements of what the record contains. Putting it mildly, the case is presented in this court in a very unworkmanlike manner.

The trial court could properly find that on May 9, 1931, Goetz became the owner of 90 of the 250 shares of the defendant's

[illegible] SALE, v. [illegible].
Defendant in error.

vs.

[illegible] CONTINENTAL SERVICE, INC.,
Plaintiff in Error.

MR. JUSTICE BRANDEIS DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of a judgment against it for $[illegible], entered upon a finding of the court without a jury. The action was upon a promissory note purporting to be signed by the defendant in the order of plaintiff, constituting a piece of negotiable commercial paper; judgment was previously entered by virtue of this power of attorney but some months later by the defendant it was vacated and the case was tried upon the merits, with the resulting judgment so stated. The note is dated June 8, 1921, to the order of plaintiff for $[illegible], seven per cent interest, and is signed:

"Continental Investment Service Inc.
By [illegible], Pres. & Treas."

Defendant denies the authority of those to sign the note.

Each of the points of both sources is derived in a very satisfactory to the trial court, and it is contended in a application presented over a year after judgment was entered and which is signed by respective counsel and sworn upon by the trial judge. It was also stipulated that photostatic copies may be made of all exhibits introduced on account of the plaintiff, and that the original stock book and the original minute book of the defendant shall be made part of the record. It shall not attempt to point out the errors in the respective statements of what the record contains. Putting it mildly, the case is presented in this court in a very unfortunate manner.

The trial court could properly find that on May 9, 1921, Goetz became the owner of 50 of the 500 shares of the defendant's

capital stock, and on that date was elected president and treasurer of the defendant corporation. He testified that on that same day a resolution was passed authorizing him to borrow money from the plaintiff bank, where defendant had an account, which he did on June 5th, giving the note in question. The ledger sheet of the bank shows that the proceeds of the loan were passed to the account of the defendants. On the card of signatures kept by the bank of the persons authorized to sign for the defendant are the signatures of Goetz as president and also as treasurer. Some question was raised as to the validity of the meeting on May 9th, and a meeting of the stockholders of the defendant was held on June 17, 1931, in which all of the actions taken at the meeting of May 9th were ratified, confirmed and approved, and another resolution was passed ratifying and confirming the acts of the president and treasurer in making the loan from the plaintiff bank on June 5th.

Defendant presents what purports to be the minutes of a meeting of the stockholders of the defendant held June 1, 1930, which show that a resolution was passed that no note of the defendant should be made without the signature of two officers of the corporation, and that no officer had the power to execute any obligation without the approval of some other officer. The validity of these minutes are attacked by plaintiff. Without attempting to determine all of the facts presented and the respective claims with reference thereto, two considerations appear which justify the finding of the trial court. The first of these is, that when a president and treasurer of a corporation borrows money for the corporation, there is a presumption that he is acting within the scope of his powers. Atwater v. American Exchange Bank, 153 Ill. 605; Anderson Transfer Co. v. Fuller, 174 Ill. 221. The second fact, which does not seem to be seriously questioned by defendant, is that the money obtained from plaintiff on the loan was placed to the

material stock, and on that date was elected president and treasurer of the defendant corporation. He testified that on that same day a resolution was passed authorizing him to borrow money from the plaintiff bank, where defendant had an account, which he did on June 8th, giving the note in question. The larger share of the bank stock was held by relatives of his also were listed in the minutes of the directors. In the case of signature cards in the bank the persons authorized to sign for the defendant are the signatures of Davis as president and also as treasurer. Some evidence was raised as to the validity of the meeting on May 8th, and a meeting of the shareholders of the defendant was held on June 17, 1931, in which all of the actions taken at the meeting of May 8th were ratified, confirmed and approved, and another resolution was passed ratifying and confirming the acts of the president and treasurer in making the loan from the plaintiff bank on June 8th.

Defendant presents what purports to be the minutes of a meeting of the shareholders of the corporation held June 3, 1931, which show that a resolution was passed that the note of the defendant should be made without the endorsement of the directors of the corporation, and that an officer had the power to execute any obligation without the approval of some other officer. The validity of these minutes are attacked by plaintiff. Without discussing in detail the [illegible] of the trial court, the evidence [illegible] with reference thereto, the circumstances appear with [illegible] the finding of the trial court. The first of these is, that when a president and treasurer of a corporation borrows money for the corporation, there is a presumption that he is taking action for the benefit of the corporation. [illegible] 174 Ill. 404. The second fact, which does not seem to be seriously questioned by defendant, is that the money obtained from plaintiff on the loan was placed to the

credit of the defendant and thereafter drawn out by it in small amounts. Where a principal actually receives the benefit of money procured, even by the unauthorized acts of its agent, the principal will be liable to the amount it has been benefitted. First Nat'l Bank v. Cherne, 181 Ill. 25; Fay v. Slaughter, 194 Ill. 157; Alton Mfg. Co. v. Biblical Institute, 245 Ill. 298; Sargent v. McDonough & Co., 197 Ill. App. 523. The record shows that defendant received the benefit of the loan and has not offered to restore the money to the plaintiff.

Complaint is made of the court's refusal to admit the testimony of E. I. Salinger, Jr., the attorney for the defendant, and also the testimony of Zelda Friedman, assistant secretary of the defendant. There was no error in this respect. Salinger merely offered to testify as to a notice he gave the plaintiff bank after the execution of the note, "advising the bank of the corporation's responsibility for the note." Zelda Friedman offered to testify as to something, not stated, Goetz had told her when she signed checks after the amount of the loan had been deposited in the bank. There is no offer to show that Goetz told her anything relevant or material to the issues in the case.

No satisfactory reason is presented calling for a reversal, and the judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

merits of the determination of insurance claims put by it in small amounts. Where a principal actually receives the benefit of money paid, even by the unauthorized act of his agent, the principal will be liable to the amount it has been benefited. Elliott Auto Lease v. Jones, 101 Ill. App. 2d 1, 241 N.E.2d 19; Ill. Rev. Stat. 1969, ch. 110, par. 2-403; Restatement (Second) of Agency, par. 103. The record shows that defendant received the benefit of the loan and has not offered to return the money to the plaintiff.

Complaint is made of the court's refusal to admit the testimony of R. E. Dalinger, Jr., the attorney for the defendant, and also the testimony of Zada Pitchess, assistant secretary of the defendant. There was no error in this respect. Dalinger merely offered to testify as to a notice he gave the plaintiff back after the execution of the note, "relating the loss of the corporation's responsibility for the note." Zada Pitchess offered to testify as to something, not stated, Smith had told her when she signed checks after the amount of the loan had been deposited in the bank. There is no offer to show that these acts had her speaking statements or material to be issues in the case.

As substantiated issues is presented relying for a reversal, the judgment is therefore affirmed.

Affirmed.

Ketchum, P. J., and Stamos, J., concur.

36969

LEWIS GOWEN and ILLINOIS OFFICE SUPPLY COMPANY, a Corporation,
Appellants,

vs.

FRANK THORNBER and FRANK THORNBER & COMPANY, a Corporation,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

147

272 I.A. 626

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainants by their bill sought to enjoin the violation by defendants of a restrictive covenant in a contract; defendants demurred, which was sustained, the bill dismissed for want of equity, and complainants appeal.

The bill alleges that Lewis Gowen, a complainant, and Frank Thornber, a defendant, were stockholders in the Illinois Office Supply Company, a corporation; that August 26, 1930, Thornber sold his stock to Gowen for a consideration of $50,000; that at this time a contract was made between the parties wherein it was recited that as a further consideration for the payment of $50,000, Thornber agreed

"that he will not for a period of five years from the date of this contract directly or indirectly, either alone or with any other person, firm or corporation, as employee, stockholder, officer, manager or otherwise, follow or engage within the State of Illinois in the business of manufacturing, buying, selling, handling or dealing in any of the merchandise, articles of equipment manufactured, bought, sold or dealt in by the Illinois Office Supply Company of Ottawa, Illinois. It being the intention that in the consummation of the sale of said corporate stock, the party of the second part does hereby transfer, set over and give to the party of the first part his good will in the business of as a salesman for the Illinois Office Supply Company, a corporation, and that he will not engage in business in any manner, way or form in the State of Illinois in competition with said corporation for the period of five years from the date of this contract."

There was also a provision that nothing in the contract should limit or prevent Thornber from further entering the employment of Gowen or the Illinois Office Supply Company in any capacity. Complainants' business is producing election blanks and supplies, record books and other supplies furnished various officials in Illinois.

[illegible] and [illegible] [illegible]
[illegible], a corporation,
Appellants,

vs.

[illegible] and [illegible] [illegible]
a [illegible], a Corporation,
Appellees.

[illegible]

Complainants by their bill sought to enjoin the violation by defendants of a restrictive covenant in a contract; defendants demurred, which was sustained, the bill dismissed for want of equity, and complainants appeal.

The bill alleges that Irvin Lewis, a musician, and Frank Murphy, a defendant, were disembarkers in the Illinois Office Supply Company, a corporation doing business in Illinois. Lewis made his stand to leave for a consideration of $3,000; that at this time a contract was made between the parties wherein it was recited that as a further consideration for the payment of $50,000, Murphy agreed

"that he will not for a period of five years from the date of this contract directly or indirectly, either alone or with any other person, firm or corporation, as employee, stockholder, officer, manager or otherwise, follow or engage within the State of Illinois in the business of manufacturing, buying, selling, handling or dealing in any of the merchandise, articles of equipment manufactured, bought, sold or dealt in by the Illinois Office Supply Company of Chicago, Illinois. In case the corporation that is the successor of the mode of all corporate stock, the party of the second part does hereby transfer, set over and give to the party of the first part his real well in the business of as a business for the Illinois Office Supply Company, a corporation, and does he will not engage in business in any manner, may or form in the state of Illinois in competition with said corporation for the period of five years from the date of this contract."

There was also a provision that working in the contract should limit or prevent Murphy from further engaging the employment of Owen or the Illinois Office Supply Company in any capacity. Complainants' business is producing election films and supplies, sound films and other supplies furnished voters within Illinois.

The bill alleges that for a time Thornber continued to work for complainants, but soon after he resigned his position and thereafter solicited business from former customers of complainants and sent such orders to complainants' competitors. Complainants asked for an injunction order restraining defendants, their officers, agents and attorneys "from violating the terms and conditions" of the contract.

It will be noted that the restrictive covenant in the contract attempted to restrain Thornber from engaging in the business within the State of Illinois, and defendants say that such a restrictive covenant is void under the authority of Parish v. Schwartz, 344 Ill. 563. That case presented the identical question now before us. When Parish v. Schwartz was in this court (252 Ill. App. 591) we cited in the opinion a large number of cases sustaining the validity of such contracts, but we felt constrained to follow the decisions of our Supreme court in Lanzit v. Sefton Mfg. Co., 184 Ill. 326, and Union Strawboard Co. v. Bonfield, 193 Ill. 420. We granted a certificate of importance to the Supreme court, where the decision of this court was affirmed, that court holding that the restrictive covenant not to do business within the State of Illinois was void and not enforceable. The question presented for determination in Parish v. Schwartz cannot be distinguished from the question presented in the instant case.

Complainants seem to recognize that the principles announced in Parish v. Schwartz are applicable to the facts here, but urge that these principles should be modified. The same argument was made in the Supreme court and it was held that if public policy required such a change the remedy must be found through the legislature. Geoghegan v. Union Elevated Railroad Co., 266 Ill. 482; Ohnesorge v. Chicago City Railway Co., 259 Ill. 424; Boston Store v. American Graphophone Co., 246 U. S. 8.

The bill changes that for a time thereafter remained to wait for complainants, but even after he realized his position and thereafter collected business from former customers of complainants and sent such orders to complainants' competitors. Complainants added I.C. an injunction after restraining defendants, their officers, agents and attorneys "from violating the terms and conditions" of the contract.

It will be noted that the restrictive covenant in the contract attempted to restrain former employees from engaging in the business within the state of Illinois, and determines only that such a restrictive covenant is void under the authority of Cantor v. Sunshine, 326 Ill. 521. That case involved the identical question now before us. Then Fallon v. Schwartz was in this court (326 Ill. 524, 527) we stated in the opinion a brief summary of cases considering the validity of such contracts, but no fact contributed to Fallon the decisions of our Supreme Court in Lapidus v. Pelham Ice Co., 168 Ill. 324, and Wolfe Distributing Co. v. Gaffney, 222 Ill. 114. We granted a certificate of importance to the Supreme Court, since the decision of this court was affirmed, that court holding that the restrictive covenant not to do business within the State of Illinois was void and not enforceable. The question presented for determination in Fallon v. Schwartz cannot be distinguished from the question presented in the instant case.

Complainants seem to recognize that the principles announced in Fallon v. Schwartz are applicable to the facts here, but urge that those principles should be modified. The same argument was made in the Supreme court and it was held that if public policy requires such a change the remedy must be found through the legislature. Cantor v. Union Electric Light Co., 326 Ill. 524; Fallon v. Schwartz, 326 Ill. 524; Lapidus v. Pelham Ice Co., 168 Ill. 324; Wolfe Distributing Co. v. Gaffney, 222 Ill. 114; American Green Stamp Co., 326 Ill. 5.

Following these decisions, we hold that the restrictive covenant under consideration is void and that the Chancellor properly sustained a demurrer to complainants' bill.

Other considerations are presented in the briefs, which we do not deem it necessary to discuss. The opinion in Parish v. Schwartz is conclusive and we follow it.

For the reasons indicated the decree of the Superior court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

Despite these decisions, we hold that the preliminary approval order complained in this and that the Commission properly exercised a discretion in conditioning this.

Other contentions are presented in the briefs, which we do not deem it necessary to discuss. The opinion in *Pickle v. Tennessee* is conclusive and we follow it.

For the reasons indicated the decree of the District Court is affirmed.

Affirmed.

Mahaffey, P. J., and O'Connor, J., concur.

148 H

36999

CLAPP, RILEY & HALE EQUIPMENT COMPANY, a corporation,
Appellee,

v.

L. R. FUGITT CONSTRUCTION COMPANY, a corporation, et al.
Defendants.

ON APPEAL OF UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

272 I.A. 626

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in debt against the two defendants; the Construction company was not served and did not file an appearance; the Fidelity & Guaranty company, hereafter called defendant, filed a general demurrer to the amended declaration, which was overruled; defendant elected to stand upon the demurrer; the court heard evidence and assessed plaintiff's damages in the sum of $1,117.62; defendant appeals from the judgment.

Plaintiff brought suit upon a bond of the Construction company, with defendant company as surety, given to the County of Cook to insure the performance by the Construction company of a contract to build a highway in Cook county; plaintiff alleged that it furnished certain equipment to the Construction company for which it had not been paid and it brought suit on the bond to recover the amount due for this equipment, claiming that the bond was made for the benefit of subcontractors and material men who had furnished material to the Construction company. Defendant says that the bond was made solely for the benefit of Cook county,

Plaintiff brought suit in debt against the two defendants; the defendants answer was not sworn and did not file an affidavit. The Plaintiff & Counsel, Dorsey & Allen defendant, filed a general demurrer to the amended declaration, which was sustained; defendant claims to stand upon the demurrer; the court found evidence that Plaintiff's claim in the sum of $2,317.48; defendant appeals from the judgment.

Plaintiff brought suit upon a bond of the construction company, with defendant company as surety, given to the county of Cook to insure the performance by the construction company of a contract to build a library in Cook County. Plaintiff alleges that it furnished certain equipment to the construction company for which it has not been paid and it brought suit on the bond to recover the amount due for this equipment, claiming that the bond was made for the benefit of subcontractors and material men who had furnished material to the construction company. Defendant says that the bond was made solely for the benefit of Cook county,

not for the benefit of material men furnishing material to the Construction company, and hence plaintiff has no rights under the bond.

"The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed. The liability so appearing can not be extended or enlarged on the ground, alone, that the situation and circumstances of the parties justify or demand further or other liability." Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252.

Does the bond affirmatively show liability for labor or material furnished? The only agreement in the bond, material to the present question, is to keep the county of Cook harmless "against all liabilities, liens, claims, judgments, * * * and expenses which may in anywise accrue against the said The County of Cook in consequence of the granting of said contract or the doing of the work thereunder."

Similar bonds have been construed by our courts, which have uniformly held that in the absence of an express provision covering payment to subcontractors for material or labor they have no rights in the bond.

The leading case is Searles v. City of Flora, 225 Ill. 167. There Searles had entered into a contract with the City of Flora to rebuild its electric light station; he furnished a bond signed by a surety company for the faithful performance of his contract; Searles bought a machine which was used in the work but failed to pay for it; the City, for the use of the seller of the machine, sued Searles and the surety; the contract provided that Searles was to pay for all machinery, equipment and labor

not for the benefit of material men furnishing material to the Revolution company, and hence plaintiff has no rights under the bond.

"The rule is, that the right of a third party beneficiary by a contract in one person rests upon the liability of the promisor, and this liability must ultimatively appear from the obligation of the instrument when properly interpreted and construed. The liability or obligation can not be enlarged or enlarged on the ground, alone, that the situation and circumstances of the parties lead to a doubt rather as what liability." Brown Style Paint Co. v. Doherty, 248 Ill. 488.

Does the bond ultimatively show liability for labor or material furnished? The only expression in the bond, material to the present question, is to keep the county or town harmless "against all liability, loss, claims, judgments, " " " and expenses which may in anything occurring against the said the county or town in consequence of the furnishing of said contract or the doing of the work thereunder."

Similar bonds have been construed by our courts, which have positively held that in the absence of an express provision permitting to materialmen for material or labor they are no rights to the bond.

The leading case is Quincy v. City of Chicago, 103 Ill. 217. There Doctor had entered into a contract with the City of Chicago to provide its elevator light station; he furnished a bond signed by a surety company for the faithful performance of his contract. Doctor bought a machine which was used in the work but failed to pay for it; the city, for the use of the seller of the machine, paid Crosby and the surety; the contract provided that Doctor was to pay for all machinery, equipment and labor

for the improvement, and the bond, after reciting the terms of the contract, provided that Searles should perform each and every of the matters and things specified and set forth in the contract to be kept, done and performed by him in the manner in said contract specified, and should pay to the obligee all losses and damages sustained by reason of his failure in this respect. It was held that the bond was not entered into with the intention of securing third parties as to labor and material furnished in the completion of the contract; that it was entered into solely for the purpose of securing the City of Flora. In the recent case of People v. Merkle, 269 Ill. App. 449, (certiorari denied by the Supreme court) a material man brought suit upon a bond given to insure the performance of a contract for the construction of a pipe system at a State Hospital; the contract provided that the contractor should pay for all labor and materials used in the work, and the bond was conditioned on the contractor performing each and every of the agreements in the contract; the opinion discusses the decisions in this state construing similar contracts and held that the material men could not maintain a suit against the surety company on the bond. Bonds and other contracts containing similar provisions were also so construed in Kenfield Publishing Co. v. Baumgartner, 189 Ill. App. 413; Masters v. Dunlap, 231 Ill. App. 395; Nicholson v. Nicholson Coal Co., 190 Ill. App. 607; Seefeldt v. Wilgen, 193 Ill. App. 315; Aurora, Elgin & Chicago R. Co. v. National Surety Co., 198 Ill. App. 502; Spaulding Lumber Co. v. Brown, 171 Ill. 487.

The right of a subcontractor to bring suit on the bond has been sustained where the bond contains an express provision that the general contractor shall pay all the persons who have contracts for labor and material. Danville Hotel Co. v. Benson,

for the improvement, and the bond, after recalling the terms of the contract, provided that Bentley should perform such and every of the artists and things specified and set forth in the contract to be kept, done and performed by him in the manner in such contract specified, and should pay to the artisan all labors and charges contained by reason of his failure in this respect. It was held that the bond was not entered into with the intention of supplying their profits as to labor and material furnished in the completion of the contract; that it was entered into solely for the purpose of securing the City of Yazoo. In the recent case of Bangle v. Hughes, 209 Ill. App. 449, (certiorari denied by the supreme court) a material man brought suit upon a bond given to secure the performance of a contract for the construction of a tile system at a state hospital; the contract provided that the contractor should pay for all labor and materials used in the work, and the bond was conditioned on the contractor performing each and every of the agreements in the contract; the opinion discusses the decisions in this state concerning similar contracts and held that the material man could not maintain a suit against the surety company on the bond.

and other contracts

Provisions were also so construed in Bankers Publishing Co. v. Fleischer, 130 Ill. App. 439; Bowers v. Hughes, 201 Ill. App. 391; Hinchman v. Chicago Dock Co., 220 Ill. App. 417; Bartlett v. Stone, 191 Ill. 429; Bauer v. Chicago & Dickson R. Co. v. Bonfield Construction Co., 191 Ill. App. 488; Hamilton Lumber Co. v. Kamen, 171 Ill. 487.

The right of a materialman to bring suit on the bond has been sustained where the bond contains an express provision that the general contractor shall pay all the persons who have furnished for labor and material. Sanitaire Water Co. v. Bonnett

262 Ill. App. 288; Cherry v. Benson, 264 Ill. App. 199; Carson, Pirie Scott & Co. v. Parrett, 346 Ill. 252.

The omission in bonds to provide for payment to the subcontractors was recognized by the legislature by the passage of the act providing that bonds for public works shall be conditioned for the payment of material and labor, in force July 1, 1931, which is subsequent to the date of the bond now under consideration. Chap. 127, para. 71, Cahill Illinois Statutes (1931).

Plaintiff argues that he can recover under the condition of the bond in which the contractor agrees to keep the County of Cook harmless against any liabilities or liens which may accrue against the County of Cook in consequence of the contract, and claims that it has a lien against the County of Cook. Assuming that this provision of the bond includes any lien claimed by a subcontractor, the declaration fails to allege a lawful lien.

The Mechanics' Liens Statute, chap. 82, sec. 23, provides, in substance, that a subcontractor furnishing any material or labor for any public work shall have a lien on the money, bonds or warrants due or to become due the contractor, provided that notice is given, and that such lien shall attach only to that portion of the money, bonds or warrants against which no voucher has been issued and delivered to the contractor at the time of such notice. Plaintiff's declaration alleges, only, that December 1, 1931, it filed a lien notice with the County of Cook and demanded the money due it, which the County of Cook refused to pay. These allegations do not assert any lien against the funds in the hands of the County. There is no allegation that there are any funds in the hands of the County due on the contract or funds against which no voucher has been issued. Public property cannot be subjected to a mechanic's lien and the claimant must look solely to the funds, as stated in the Mechanics' Lien Statute.

[illegible] 1911-1912, 1913, Stevens, [illegible] v. Fenwick, 144 111. 488.

The majority in Banks is proving the payment is the administrators was required by the legislature by the payment of the not preferring that bonds for public works should be undertaken for the payment of material and labor, in force July 1, 1911, which is subsequent to the date of the bond now under consideration. Comp. Ill. Ann. St. Cahill Ill. Statutes (1912).

Plaintiff argues that he can recover under the condition of the bond in which the contractor agrees to keep the county of Cook harmless against any liabilities or liens which may accrue against the County of Cook in consequence of the contract, and claims that it has a lien against the County of Cook. Assuming that the provisions of the bond including any lien claimed by a subcontractor, the declaration fails to allege a lien.

The Brandeis' lien (Brandeis, Comp. Ill. ann. 1. 1. provides, in substance, that a subcontractor furnishing any material or labor for any public work shall have a lien on the money, bonds or warrants due or to become due the contractor, provided that notice is given, and that such lien shall attach only to that portion of the money, bonds or warrants equitably which an vendors has not been paid. Liens on the contractor as the time of such notice. Plaintiff's declaration alleges, that December 1, 1909, it filed a lien notice with the County of Cook and demanded the money due it, which the county or Cook refused to pay. These allegations do not assert any lien against the funds in the hands of the County. There is no allegation that there are any funds in the hands of the County due on the contract or funds against which no vendor has been issued. Public property cannot be subjected to a mechanic's lien and the statutes were look solely to the funds, as stated in the Mechanics' Lien Statute.

Moreover, as was held in Searles v. City of Flora, supra, the surety company is required to reimburse the city and save it harmless only if the city has been required to pay a claim. Plaintiff's declaration does not allege that the County of Cook has paid any moneys on account of any claim or lien.

The bond does not place upon the surety the responsibility of following the principal contractor to see whether it has paid the subcontractors; it only agreed to indemnify the County of Cook for any liability it might sustain.

We hold that the trial court should have sustained defendant's demurrer. The judgment is therefore reversed and the cause remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

149 A

37000

THE COUNTY OF COOK FOR THE USE OF WESTERN CONTRACTORS SUPPLY COMPANY, a corporation,
Appellee,

v.

L. E. FUGITT CONSTRUCTION COMPANY, a corporation, et al.

ON THE APPEAL OF UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

272 I.A. 627

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This case involves the same proceedings and questions as are considered in No. 36999, in which an opinion has been filed this day. Here the judgment against the United States Fidelity & Guaranty Company was for $1,211.22.

For the reasons stated in the opinion in No. 36999, we hold that the demurrer of the defendant to plaintiff's declaration should have been sustained, and the judgment is reversed and the cause remanded for further proceedings consistent with what we have said in that opinion.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

36644

JOSEPH L. GILL,
Appellee,

vs.

L. MONTEFIORE STEIN, C. GROVERMAN ELLIS, BENJAMIN F. STEIN and JOHN F. BRENNAN, Doing Business as STEIN, ALSTRIN & CO.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

150

272 I.A. 627

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 18, 1932, plaintiff brought an action of replevin against defendants to recover 370 shares of the capital stock of the William Wrigley, Jr. Company, a corporation, alleging that he had deposited the stock with defendants as collateral security for his trading account; that on December 23, 1931, he owed defendants $9865 on his account, which he tendered to them and demanded the return of the stock; that the tender and demand were refused and that the value of the stock was $19,240. The stock not having been obtained by the plaintiff on the writ, plaintiff filed counts in trover. The defense interposed was that the stock had been delivered to them by James A. Gill, who had a large account with defendants, and that they were holding the stock as collateral security for his account. There was a trial without a jury and a finding and judgment in plaintiff's favor for $9843.75, being the value of the stock on December 23, 1931, less $9865, which amount plaintiff admitted was due defendants that day, on his account.

The record discloses that James A. Gill is a brother of plaintiff and for many years occupied a responsible position with the William Wrigley Jr. Company, with offices in the Wrigley building, Chicago; that the defendants are well known stock brokers, with main office in the Rookery building, on LaSalle street, with a branch office in the Wrigley building; that James A. Gill was trading in stocks with the defendants, substantially all of his dealings being made through the branch office; that his dealings

State

George L. Gill,

Appellee,

vs.

[illegible]

[illegible]

[illegible]

involved large sums and his account was always in a strong financial condition; that in March, 1922, plaintiff had his first dealings with defendants, and the last transaction was in April, 1926. His dealings were never large and all of them were made through his elder brother, James A. Gill; plaintiff at no time came in contact with any of the defendants or their representatives either personally or otherwise. His first transaction was in March, 1922, when he gave defendants $1500, and the following month he gave them $1500 more. May 17, 1922, James A. Gill wrote a letter to defendants authorizing them to use the collateral he had up with defendants to cover any demands in the accounts of plaintiff or of Richard F. Gill, another brother. July 9, 1923, plaintiff gave 50 shares of Sinclair Oil and 90 shares of Wrigley stock to his brother James, with instructions to deliver the stock to defendants to be held by them as collateral security for plaintiff's account. He endorsed the certificates and executed powers of attorney, as is usual in such cases, gave them to his brother James and James delivered them to defendants. Afterward, the Wrigley Company issued three shares for one, so that the ninety shares became 270 and the new certificates were endorsed and powers of attorney executed by plaintiff and given to his brother James, who delivered them to defendants. Plaintiff's stock, the 50 shares of Sinclair Oil, and the 90 shares of Wrigley (later the 270) were placed by defendants as collateral to the account of James A. Gill, and were not carried in plaintiff's account.

About the 1st of May, 1924, plaintiff decided to sell his Sinclair Oil stock and requested his br ther James to have defendants do so. James carried out these instructions, and on May 1, 1924, defendants transferred the 50 shares of Sinclair Oil from James' account to plaintiff's, sold it the next day, and sent a check for the proceeds thereof, $3996.15, to plaintiff. August 29, 1924, plaintiff gave his brother James another 100 shares of

involved large sums and his account was always in a strong financial condition; that in March, 1920, plaintiff had his first dealings with defendants, and the last transaction was in April, 1922. The dealings were never large and all of them were made through his older brother, James L. Gill; plaintiff at no time came in contact with any of the defendants or their representatives either personally or otherwise. The first transaction was in March, 1921, when he gave defendants $100, and the following month he gave them $150 more. May 17, 1921, James L. Gill wrote a letter to defendants authorizing them to use the collateral he had up with defendants to cover any demands in the accounts of plaintiff or of Edward G. Gill, another brother. May 7, 1924, plaintiff gave to defendants Standard Oil and 50 shares of Pulpley stock to his brother James, with instructions to deliver the stock to defendants to be held as collateral security for plaintiff's account. In delivering the certificates and executed powers of attorney, he so would in such cases, gave them to his brother James and never delivered them to defendants. Afterward, the Pulpley Company issued seven shares for one, so that the ninety shares became 630 and the new certificates were endorsed and powers of attorney executed by plaintiff and given to his brother James, who delivered them to defendants. Plaintiff's claim, the 90 shares of Standard Oil, and the 90 shares of Pulpley (later the 630) were pledged by defendants as collateral to the account of James L. Gill, and were not carried in plaintiff's account.

About the 1st of May, 1924, plaintiff decided to sell his Standard Oil stock and requested his brother James to have defendants do so. These carried out these instructions, and on May 1, 1924, defendants transferred the 90 shares of Standard Oil from James' account to plaintiff's, with it the same day, and took a check for its proceeds (1924.12). To plaintiff. Another on, 1924, plaintiff gave his brother James another 90 shares of

Wrigley stock with instructions that it be used as collateral for plaintiff's loan from defendants. He endorsed the stock certificate, executed the power of attorney, and delivered both to his brother James, who in turn delivered them to defendants. December 23, 1931, plaintiff tendered to defendants the amount he owed them, $2865, and demanded his 370 shares of Wrigley stock and, as stated, the tender and demand were refused because defendants claimed they were holding the stock as collateral for James A. Gill's account.

Defendants contend (1) that the 370 shares of Wrigley stock in question were pledged by James A. Gill to secure his own account with them, and that the finding of the court to the contrary is against the manifest weight of the evidence; (2) that "The receipt by defendants from James A. Gill of the stock in controversy, accompanied by powers of attorney endorsed in blank by plaintiff, as collateral security for the account of James A. Gill, without notice of any claimed interest by plaintiff in and to said stock, constituted the defendants <u>bona fide</u> pledgees for value of said stock, and entitled the defendants to hold it as security for the account of James A. Gill, free and clear of plaintiff's interest, if any, therein;" (3) that even if the application by defendants of plaintiff's stock as collateral for the account of James A. Gill was unauthorized, plaintiff ratified such application by the failure of himself or his agent James to repudiate such application within a reasonable time after plaintiff or his agent learned of such unauthorized application, and is now estopped to assert that the pledging of the stock as collateral for James A. Gill's account was unauthorized; and (4) that the plaintiff's cause of action is barred by the Five Year Statute of Limitations; that defendants applied the stock in question as collateral for James A. Gill's account in July, 1923, and August,

Trigby alone with instructions that it be used as collateral for plaintiff's loan from defendants. On maturity the note remained, remained the power of attorney, and delivered both to his brother James, who is now indicted here in defendants. December 22, 1920, plaintiff brought to defendants the money to pay the note, but defendants refused to accept it unless, first, he delivered the power of attorney and Trigby note; and, upon demand, the brother and James Trigby also refused to deliver the power of attorney and Trigby note, or either, the latter and James Trigby offered various defenses claimed they were holding the stock as collateral for Jones & Gill's account.

Defendants admitted (1) that the 370 shares of Trigby stock in question were pledged by James A. Gill to secure his own account with them, and that the finding of the court to the contrary is against the manifest weight of the evidence; (2) that the receipt by defendants from James A. Gill of the stock in controversy, accompanied by powers of attorney endorsed in blank by plaintiff, as collateral security for the account of James A. Gill, without notice of any claimed interest by plaintiff in and to said stock, constituted the defendants bona fide pledgees for value of said stock, and entitled the defendants to hold it as security for the account of James A. Gill, free and clear of plaintiff's interest; if any, therein;" (3) that even if the application by defendants of plaintiff's stock as collateral for the account of James A. Gill was unauthorized, plaintiff ratified such application by the failure of himself or his agent James to repudiate such application within a reasonable time after plaintiff or his agent learned of such unauthorized application, and is now estopped to assert that the pledging of the stock as collateral for James A. Gill's account was unauthorized; and (4) that the plaintiff's cause of action is barred by the five year statute of limitations; that defendants rejected the stock in question as collateral for James A. Gill's account in July, 1920, and demand,

1924, and if the application was unauthorized, it amounted to a conversion which would be barred within the five years, and since the suit was not brought until April, 1932, the action cannot be maintained.

(1) Plaintiff testified that he was clerk of the Municipal court of Chicago, and opened an account with defendants in March, 1922, by depositing money and securities through his brother, James A. Gill, with defendants; that in July, 1923, he gave his brother 50 shares of Sinclair Oil stock and 90 shares of Wrigley Company stock and told him to deposit it as collateral security to his account with defendants, which the brother agreed to do; (the 90 shares afterward became 270 shares); that in August, 1924, he gave his brother James another 100 shares of Wrigley stock for the same purpose, and with the same instructions; that he personally never gave any orders to anyone connected with defendants; that he endorsed the stock certificates in blank and signed powers of attorney in connection with them, and delivered them all to his brother James; that the brother requested that he sign the powers of attorney. He further testified that he received each month through the mail a statement from defendants, from the time he opened his account in March, 1922. These statements, numbering 68, were offered by defendants and received in evidence. Plaintiff testified that he looked over these statements as they came in monthly but never took any of them up with defendants in any manner. He was then shown the statement sent him by the defendants of July 9, 1923, which shows the balance due from him, together with interest thereon; it also shows the receipt of three items of dividends on three different stocks, aggregating $140. On this statement, near the bottom at the left hand, appears the following: "100 Glidden, Long; 100 Cuba Am Sug Long; 50 Household Fred., Long; 100 Gill MFG. Long; 100 Eaton Axle & Spg., Long; 100 Hydrox, Long."

1924, and if the application was unauthorized, it amounted to a conversion which would be barred within the five years, and since the suit was not brought until April, 1927, the defense cannot be maintained.

(3) Plaintiff testified that he was clerk of the municipal court of Chicago, and opened an account with defendants in March, 1922, by depositing money and securities through his brother, James A. Gill, with defendants; that in July, 1922, he gave his brother 50 shares of Standard Oil stock and 20 shares of Midland Company stock and told him to deposit it as collateral security in his account with defendants, which the brother proceeded to do; (the 50 shares afterward became 150 shares; that in August, 1924, he gave his brother James another 100 shares of Midland stock for the same purpose, and told the same instructions; that he personally never gave any orders to buy or sell securities; that he was interest the stock certificates in black and signed letters of attorney in connection with them, and delivered them all to his brother James; that the brother transferred them to the names of attorney. The letters initialed were as received such stock through the mail a statement from defendants, from the time he opened his account in March, 1922. These statements, numbering 14, were offered by defendants and received in evidence. Plaintiff testified that he looked over these statements as they came in monthly but never took any of them up with defendants in any manner. He was then shown the statement sent him by the defendants of July 9, 1923, which shows the balance due from him, together with interest thereon; it also shows the receipt of three lots of stock as three different stocks, corresponding item. On this statement, near the bottom of the left hand, appears the following: "Jas. Gillen, James 100 Pfd. on the Lamont St. Securities Pref., Lamont Sec. Corp., Lamont Sec. Corp. Class A Pfd., Lamont Sec. Corp. Class B Pfd."

Counsel for defendants then asked him if he did not know from this statement that the 50 shares of Sinclair Oil and 90 shares of Wrigley company were not carried by defendants as collateral for his account, from the fact that they did not appear on the statement; to which he replied, "I never thought that collateral had to be there." Plaintiff further testified that he received monthly dividends regularly on the Wrigley stock, and never questioned the collateral held by defendants in his account.

James A. Gill, brother of plaintiff, testified that he was assistant treasurer of the William Wrigley Jr. Company; that he had been employed by that company for over thirty years; that he had business dealings with defendants, who maintain a branch office in the Wrigley building, where the Wrigley company was located; that July 9, 1923, he had a talk with Arthur Alstrin, who was in charge of defendants' branch office, and delivered to him the 50 shares of Sinclair Oil and the 90 shares of Wrigley stock belonging to and in the name of plaintiff, and told Alstrin that plaintiff wanted the stock put up as collateral for plaintiff's account, and that Alstrin replied it would be taken care of in the main office and the stock applied to the proper account; that on August 29, 1924, the witness again went to the branch office and talked to Arthur Alstrin and delivered the certificate for 100 shares of Wrigley stock belonging to plaintiff to defendants to be used as collateral for plaintiff's account. On cross examination he testified that July 9, 1923, when he turned over plaintiff's stock to defendants he also turned in certificates of stock of the Wrigley company that were in his own name, and that he received a receipt for all the stock; that he read the receipt and asked why a separate receipt was not given for plaintiff's stock, and that Alstrin replied it would not make any difference, that the main office would take care of the matter and apply the stock to the

counsel for defendants then asked him if he did not know from this statement that the 50 shares of Standard Oil and 50 shares of Wrigley company were not carried by defendants as collateral for his account, from the fact that they did not appear on the statement; to which he replied, "I never thought that collateral had to be shown." Plaintiff further testified that he received monthly statements regularly on the Wrigley stock, and never questioned the collateral held by defendants in his account.

James A. Will, brother of plaintiff, testified that he was assistant treasurer of the William Wrigley Jr. Company, that he had been employed by that company for over twenty years; that he had business dealings with defendants, who maintain a branch office in the Wrigley building, where the Wrigley company was located; that July 9, 1923, he had a talk with Albert Martin, who was in charge of defendants' branch office, and delivered to him the 50 shares of Standard Oil and the 50 shares of Wrigley stock belonging to and in the name of plaintiff, at this interview that plaintiff wanted the stock put up as collateral for plaintiff's account, and that Martin replied it would be taken care of in the main office and the stock applied to the proper account; that on August 28, 1924, he witness again went to the branch office and talked to Arthur Martin and delivered the certificate for 100 shares of Wrigley stock belonging to plaintiff to defendants to be used as collateral for plaintiff's account. On cross examination he testified that July 9, 1923, when he turned over plaintiff's stock to defendants he also turned in certificates of stock of the Wrigley company that were in his own name, and that he received a receipt for all the stock; that he read the receipt and asked why a separate receipt was not given for plaintiff's stock, and that Martin replied it would not make any difference, that the main office would take care of the matter and apply the stock to the

proper account; that he did not ask Alstrin to correct the receipt; that he did not think it necessary; that he had confidence in Alstrin and knew defendants were a reputable house; that August 29, 1924, he delivered to Arthur Alstrin, for defendants, certificates for 600 shares of Wrigley stock, 100 of which belonged to plaintiff and the 500 shares to himself, for which he received a receipt; that he stated the 100 shares were to be applied as collateral for plaintiff's account and the 500 shares for his own account; that he again made some reference to the fact that a receipt for the 100 shares should run to plaintiff, and that Alstrin said that would be taken care of and the stock applied to the two accounts. The two receipts are in evidence. The receipts are signed by the defendants. The first acknowledged receipt from James A. Gill of 50 shares of Sinclair Oil stock and 190 shares of Wrigley stock, evidenced by a number of certificates, and giving the number of certificates. It is signed by defendants per "H. W." The other receipt is substantially the same, acknowledges the receipt of 600 shares of Wrigley stock, and is signed by the defendants per "A. J. L." The witness further testified that he received monthly statements of his account regularly from defendants and they are in evidence; that he probably glanced at the statements when they were received, and that, "I still think that wasn't the custom at that time of listing on the customer's account the collateral in the account;" that he made no complaint to any one representing defendants about the statements; that at one time defendants sold a number of shares of the Wrigley stock belonging to the witness, and that he afterward complained to defendants that in this sale they had erroneously sold 100 shares of the stock belonging to plaintiff, that the sale should have been of the witness' stock only; that thereafter defendants caused a certificate for 100 shares of the Wrigley stock standing in witness' name

proper account; that he did not use diligence to discover the ex-
istence; that he did not think it necessary; that he had confidence
in Garvin and knew defendants were a responsible house; that Jerome
H. Ivry, he believed to actual digitus, for determining qualifi-
cation for 600 shares of Wrigley stock, 300 of which belonged to
plaintiff and the 300 shares to himself, for which he received a
receipt; that he stated the 300 shares were to be applied on pos-
sible for plaintiff's account and the 600 shares for his own ac-
count; that he again made some reference to the fact that a re-
ceipt for the 300 shares should run to plaintiff, and that Martin
said that would be taken care of and the stock applied to the ty
shares. The two receipts are in evidence. The receipts are
signed by the defendants. The first acknowledgment reads: "Jan
James A. Gill of 30 shares of Standard Oil stock and 300 shares of
Wrigley stock, evidenced by a number of certificates, and giving
the number of certificates. It is signed by defendants per "M. V."
The other receipt is substantially the same, substituting the ty-
weight of 600 shares of Wrigley stock, and is signed by the defend-
ants per "A. Z. L." The witness further testified that he re-
ceived monthly statements of the account regularly from defendants
and they are in evidence; that on probably glancing at the state-
ments when they were received, he "I still thinks that was the
the method at that time of listing on the customer's account the
collateral in the account;" that he made no complaint to any one
concerning defendants about the statements; that at one time de-
fendants sold a number of shares of the Wrigley stock belonging to
the witness, and that he afterward complained to defendants that
in this sale they had erroneously sold 100 shares of the stock
belonging to plaintiff, that the sale should have been of the
witness' stock only; that thereafter defendants raised a certifi-
cate for 100 shares of the Wrigley stock standing in witness' name

to be issued in plaintiff's name, so as to rectify the mistake; that this 100 shares were a part of the 370 shares the witness had deposited with the defendants; that he did not know plaintiff's stock was held by defendants as collateral for witness' account and not for plaintiff's until December, 1931; that he assumed it was being carried in plaintiff's account; that he did not know one way or the other.

The evidence further shows that in December, 1927, the Wrigley Company, a West Virginia corporation, was incorporated under the laws of Delaware, and the old certificates of stock were called in and new ones issued by the Delaware company.

James A. Gill further testified on cross examination that he had received a number of letters from defendants in which he was advised of this change, and that they were holding 1835 shares of Wrigley company stock, 1105 of which stood in witness' name, 370 in the name of plaintiff, and 360 in the name of Richard P. Gill, and they advised that the shares be deposited and proper powers of attorney be issued by plaintiff, etc., so that the new stock would take the place of the old. The witness also testified that he did not know how defendants handled the several stock certificates, but assumed they had applied them as collateral to the proper account; that he did not know plaintiff's stock was being held as collateral for his account.

For defendants Arthur J. Landwehr testified that he had been employed as a clerk by defendants for about fourteen years; that August 29, 1924, he was working for defendants in their main office in the Rookery building, as a clerk in the cashier's department. He identified the receipt issued by defendants to James A. Gill on August 29, 1924, for the 600 shares of Wrigley stock above referred to, and testified that it was in his handwriting; that the certificate of stock mentioned in the receipt was given

to him on the date of the receipt by James A. Gill in defendants' office in the Rookery building. He first testified that he had not talked with James A. Gill at the time, but later testified that Gill said, "Give me the receipt, put it in my name." He further testified that Mr. Frank Alstrin, one of the defendants, was present at the conversation the witness had with James A. Gill. Frank Alstrin was not called as a witness.

Arthur W. Alstrin, called by defendants, testified that he had been in the stock, bond and grain brokerage business for about 28 years; that for the past 12 years he was employed by defendants, who were members of the leading exchanges; that he was connected with defendants' offices in the Wrigley building from 1922 to the time of the trial; that Joseph L. Gill, James A. Gill and Richard F. Gill each had an account with defendants; that the orders for sales and purchases of stock for plaintiff were given by James A. Gill; that plaintiff did not give any orders to buy or sell; that he never talked to plaintiff in regard to the matter; that he had a talk with James A. Gill July 9, 1923, concerning the 90 shares of Wrigley stock standing in the name of plaintiff; that he handled the Gill accounts at that time for defendants; that Harry Walters was present and issued the receipt for the 50 shares of Sinclair Oil and 190 shares of Wrigley stock, and witness identified the initials signed to the receipt - "H. W." - as Harry Walters; that James A. Gill handed the witness the certificates mentioned in the receipt; that he called Harry Walters, the assistant, and told him to make out a receipt, which was done and the receipt handed by Walters to James A. Gill; that at that time James A. Gill said to witness, "Credit that collateral to my account;" that the certificate for 90 shares of the Wrigley stock was in the name of plaintiff, and that he also received at that time from James A. Gill powers of attorney; that James A. Gill did not say the 90 shares belonged to his brother, the plaintiff; that no complaint was made about the receipt and

to him on the 1st of the receipt by James A. Gill in Salvatore's office in the Bookery Building. He later testified that he had met talked with James A. Gill at the time, but later testified that Gill said, "Give me the receipt, put it in my name." He further testified that Mr. Frank Alstrin, one of the defendants, was present at the conversation the listener had with James A. Gill. Frank Alstrin was not called as a witness.

Arthur E. Martin, called by defendants, testified that he had been in the armed, hand and grain storage business for about 18 years; that for the past 17 years he was employed by Armstrong, who were members of the Lumbers exchange; that he was connected with Armstrong's offices in the Stanley Building from 1911 to the time of the trial; that George A. Gill, James A. Gill and Frank Gill each had an account with defendants; that the orders for sales and purchases of grain or provisions were given by James A. Gill; that plaintiff did not give any orders to buy or sell; that he never talked to plaintiff in regard to the matter; that he had a talk with James A. Gill July 9, 1910, concerning the 20 quarts of Stanley stock standing in the name of plaintiff; that Mr. Gill mentioned at that time for delivery; that Harry Walters was present and issued the receipts for the 20 shares of Stanley Gill and 100 shares of Stanley stock, and witness identified the initials signed to the receipt - "A. G." - as Harry Walters; that James A. Gill handed the witness the certificates mentioned in the receipt; that he called Harry Walters, the assistant, and told him to make out a receipt, which was done and the receipt handed by Walters to James A. Gill; that at that time James A. Gill said to witness, "Credit that collateral to my account;" that the certificate for 20 shares of the Stanley stock was in the name of plaintiff, and that he also received at that time from James A. Gill powers of attorney; that James A. Gill did not say the 20 shares belonged to his brother, the plaintiff; that no complaint was made about the receipt and

nothing was said about the main office applying the collateral to the proper account. The witness further testified that on August 29, 1924, he did not receive 600 shares of stock from James A. Gill and that he had nothing to do with that transaction; that he did not give the receipt in evidence to James A. Gill; that in April, 1924, James A. Gill came to the office and said he had sold through defendants 3000 shares of Wrigley stock, and that through an error 100 shares of plaintiff's stock was included; that James A. Gill said that plaintiff had complained to him that he had not received his monthly dividend on the 100 shares of stock, and that he, James, said there was a mistake in including plaintiff's 100 shares in the 3,000 shares sold, and requested defendants to transfer 100 shares of his stock to the account of plaintiff, which was later done and the new certificate, after being properly endorsed, together with a power of attorney, were given by James to defendants, who placed them in the account of James A. Gill, and that this was later shown in the monthly statements sent by defendants to James A. Gill. The witness further testified that when James A. Gill brought in plaintiff's stock and left it with defendants as collateral, witness was not expecting the stock because James A. Gill was a big man with the Wrigley company, responsible, and his account strong. This witness gave further testimony, but we think it unnecessary to discuss it in detail. Harry Walters did not testify.

There is other evidence in the record but to discuss it here would, we think, serve no useful purpose. After a careful consideration of all the evidence in the record, we are of the opinion that whether defendants were told by James A. Gill, when he delivered plaintiff's stock to them it was to be placed in plaintiff's account or whether there were no such instructions given, was a question of fact to be decided by the trial Judge, and we are unable to say that his finding in favor of plaintiff's contention is against

nothing was said about the work strike matching the testimony as the former account. The witness further testified that on August 20, 1934, he did not receive 600 shares of stock from James A. Gill and that he had nothing to do with that transaction; that he did not give the receipt to Williams to James A. Gill; that it said, instead, James A. Gill came to the office and said he had only received two thousand 3000 shares of Wrigley stock, and that through an error 1.0 shares of plaintiff's stock was included; that James A. Gill said that plaintiff had complained to him that he had not received his monthly dividend on the 1.0 shares of stock, and that he, Dawson, said there was a mistake in including plaintiff's 1.0 shares in the 2,000 shares sold, and he, Dawson, made a transfer back to transfer 1.0 shares of his own to the account of plaintiff, which was later done and the new certificate, after being properly endorsed, together with a power of attorney, were given by James to Dawson, who stated that in the account of James A. Gill, and that this was later shown in the monthly statements sent by defendants to James A. Gill. The witness Dawson testified that when James A. Gill brought to plaintiff's stock and left it with defendants as collateral, witness was negotiating the stock because James A. Gill was a big man with the Wrigley company, responsible, and his account strong. This witness gave further testimony, but we think it unnecessary to discuss it in detail. Harry Walker did not testify.

There is other evidence in the record but to discuss it here would, we think, serve no useful purpose. After a careful consideration of all the evidence in the record, we are of the opinion that whether defendants were told by James A. Gill, when he delivered plaintiff's stock to them, it was to be placed in plaintiff's account or whether there were no such instructions given, was a question of fact to be decided by the trial Judge, and we are unable to say that his finding in favor of plaintiff's contention is against

the manifest weight oftae evidence. It is obvious that defendants knew plaintiff's Sinclair Oil stock and 370 shares of Wrigley stock belonged to plaintiff. The stock certificates were in his name and endorsed by him, he executed powers of attorney and delivered them to his brother James. Later the 50 shares of Sinclair Oil were sold by defendants after the certificate had been changed by them and placed in plaintiff's account, and the proceeds received were paid by defendants to plaintiff. The Wrigley stock was paying dividends monthly and the defendants, being stockbrokers, knew that the stock stood in plaintiff's name on the records of the Wrigley company and that plaintiff was receiving his dividends therefrom. This is further shown by the fact that after defendants had sold the 3,000 shares of Wrigley company stock for James A. Gill he informed defendants that plaintiff had complained to him that he had not received his dividend on 100 shares of Wrigley stock, and it was then discovered that 100 shares of plaintiff's stock had been erroneously included in the 3,000 shares, and defendants rectified this by issuing to plaintiff a new certificate for 100 shares of stock belonging to James' account.

Nor do we think it can be said that plaintiff was advised by the monthly statements he received from defendants that his stock was not carried in his account as collateral. There is nothing to specifically indicate this, and the evidence shows that plaintiff was not familiar with defendants' system of bookkeeping. We have examined the statements and are of opinion that they would need considerable explanation before the ordinary lay man would understand that they conveyed the information now contended for by defendants. Plaintiff testified that he did not know that the statements were supposed to carry the collateral, and we think this is amply sustained by the evidence.

Of course under the law, although plaintiff's 370 shares

the monthly weight after evidence. It is strange that defendants knew plaintiff's financial ill state and 270 shares of Ry.Ly stock belonged to plaintiff. The stock certificates were in his name and endorsed by him, as executed powers of attorney and delivered them to his brother James. Later the 30 shares of Gladwin oil were sold by defendants after the certificates had been endorsed by them and placed in plaintiff's account, and the proceeds received were paid by defendants to plaintiff. The trying block was having diabetes monthly and the defendants, being physicians, knew that the risk stood in plaintiff's name on the records of the Railway company was that plaintiff was insuring his life in favor of his brother. Die is farther shown by the fact that after defendants had sold the 3,000 shares of Triplex Safety Glass for James, this he informed defendants that plaintiff had asked him that he had was received his dividend on the shares of Triplex stock, but it was then discovered that his shares of plaintiff's stock had been erroneously included in the 3,000 shares, and defendants rectified this by issuing to plaintiff a new certificate for 100 shares of stock belonging to James' account.

Nor do we think it can be said that plaintiff was advised by the monthly statements he received from defendants that his stock was not carried in his account as collateral. There is nothing to specifically indicate this, and the evidence shows that plaintiff was not familiar with defendants' system of bookkeeping. We have examined the statements and are of opinion that they would need considerable explanation before the ordinary lay man would understand that they covered the information now contended for by defendants. Plaintiff testified that he did not know that the statements were supposed to carry the collateral, and we think this is amply sustained by the evidence.

Of course under the law, although plaintiff's 270 shares

belonged to plaintiff, and this fact known to defendants, yet they could be legally pledged, under the circumstances disclosed by the evidence, by James to defendants. As stated, the evidence as to whether plaintiff's stock was delivered by James A. Gill to the defendants to be placed in plaintiff's or James A. Gill's account, was in sharp conflict, and the trial Judge, who saw and heard the witnesses, was in much better position to determine the truth than are we by the mere reading of the printed page.

(2) From what we have said it follows that the contention made by defendants that they had a valid lien on the stock in question because they received it from James A. Gill "without notice of any claimed interest by plaintiff in and to said stock," cannot be maintained. We think the great weight of the evidence is to the effect that defendants knew the stock belonged to plaintiff.

(3) and (4). The further contentions made by defendants that even if it be assumed that they, without authority, applied the stock in controversy as collateral to the account of James A. Gill, plaintiff must be deemed to have ratified or acquiesced in such application, because he failed to repudiate the application within a reasonable time after he learned of it; and that he knew of this in July, 1923, and August, 1924, from the statements he received from defendants. From what we have said in disposing of the first point we think it appears that these contentions are untenable, and especially so when it is considered that plaintiff and James A. Gill both testified that they first learned in December, 1931, that the stock had not been applied to plaintiff's account.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

36815

MILTON S. YONDORF, as Trustee,
Appellee,

vs.

FRED NEWMAN, a Bachelor, et al.,
(Defendants).

On Appeal of IDA FACTOR,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

272 I.A. 627

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Ida Factor seeks to reverse an order dismissing her intervening petition for want of equity.

July 25, 1931, Milton S. Yondorf, as trustee in a trust deed given to secure the payment of a bond issue, filed his bill to foreclose the mortgage. December 9, 1931, a decree was entered in the usual form. The property was sold pursuant to the decree, complainant, the trustee, being the purchaser. January 11, 1932, the master's report of sale and distribution was filed and approved. Afterward, on October 3, 1932, Ida Factor, by leave of court, filed her verified intervening petition, claiming that she was the owner of two bonds secured by the trust deed, of the face value of $1500; that it appears from the master's report of sale and distribution that complainant had derived $41,769.79 from the sale of the premises under the decree, and which he held for the benefit of the bondholders, and prayed that he be ordered to pay to her her pro rata share of the money. Complainant filed his verified answer, denying that the premises had been sold for cash but averring it had been bid in by complainant on behalf of the bondholders. The matter was heard on the intervening petition and answer, an order entered dismissing the petition, and this appeal followed.

The record discloses that the trust deed in question was given to secure the payment of a bond issue for $52,500, which was reduced by payments to $44,500 before the foreclosure suit was

[illegible] E. [illegible], on [illegible]
[illegible]

vs.

[illegible] MILLS, a [illegible], et al.,
[illegible]

On appeal of [illegible].

[illegible]

[illegible]

Mr. Justice [illegible] delivered the opinion of the court.

By this appeal the plaintiff seeks to reverse an order dismissing her intervening petition for want of equity.

July 23, 1921, Allen E. Pomeroy, as trustee in a trust deed given to secure the payment of a bond issue, filed his bill to foreclose the mortgage. December 7, 1921, a decree was entered in the usual form. The property was sold pursuant to the decree, confirmed, the trustee, using the proceeds. January 11, 1923, the master's report of sale and distribution was filed and approved. Afterward, on October 5, 1925, the trustee, by leave of court, filed his verified intervening petition, alleging that she was the owner of the notes secured by the trust deed, of the face value of $[illegible]; that it appears from the master's report of sale and distribution that complainant had bought [illegible] the amount of the principal and interest due, but which is not the result of the foreclosure, and prayed that be be credited to the [illegible] of the notes of the party. Complainant filed its verified answer, denying that the property had been sold for less than the amount of the bid by complainant on behalf of the bondholders. The matter was heard on the intervening petition and answer, on which evidence dismissing the petition, was duly entered.

The record discloses that the trust deed to trustee was given to secure the payment of a bond issue for $[illegible], which was reduced by payments to $[illegible]; the foreclosure sale was

brought. The bonds were sold to the public. The trust deed provided that in case of default and foreclosure the trustee, if he deemed it for the best interest of the bondholders, might buy the property at the foreclosure sale for the benefit of the bondholders, in case no other person bid the full amount of the indebtedness remaining unpaid. The trust deed further provided that at such foreclosure sale any bondholder might bid on and purchase the property and turn in his bonds toward the payment thereof, and that in case the sale was made to the complainant trustee for the benefit of the bondholders, he should be "entitled to receipt to the officer making such sale for the full amount of his bid as agent and trustee of said holders ratably for each and all of them." The decree specifically found and named the owners of bonds and the amount thereof. There was a further finding that there was due and owing to the complainant Milton S. Yonderf, as trustee, "for the benefit of the boldhonders $47,815," and it was decreed that unless this sum was paid the property be sold at public auction for cash to the highest and best bidder, and that complainant, as trustee, might bid in the property at such amount as he might determine, but as agent for the owners and holders of the bonds.

The master reported that he had made the sale, after advertising it according to law, to Milton S. Yonderf as trustee for $45,600; that being the highest and best bid. Then follows an itemized statement showing that the master had paid out the court costs and master's fees and that Milton S. Yonderf as trustee, the purchaser at the sale, had executed a receipt to the master for $41,769.79. Ida Factor, in her intervening petition, claims her proportionate share of this last named item.

Of course if the sale of the premises by the master was for cash, as Ida Factor contends, then the prayer of her petition

transfer. The bonds were sold in the public. The trust deed provided that in case of default and foreclosure the trustee, if he deemed it for the best interest of the bondholders, might buy the property at the foreclosure sale for the benefit of the bondholders, in case no other person bid the full amount of the indebtedness principal unpaid. The trust deed further provided that at such foreclosure sale any bondholder might bid on the purchase the property and have in his bonds toward the payment thereof, and that in case the sale was made to the representatives for the benefit of the bondholders, he should be entitled to transfer to the officer making such sale for the full amount of his bid on equal and transfer of said bondsmen ratably for each and all of them." The decree accordingly found and ordered the amounts of bonds and the amount thereof. There was a further finding that there was due and owing to the complainant Allen E. Lockerf, as trustee, "for the benefit of the bondholders $67,613," and it was decreed that unless bids sum was paid the property be sold at public auction for cash to the highest and best bidder, and that complainant, as trustee, might bid in the property at such amount as he might determine, but as agent for the owners and holders of the bonds.

The master reported that he had made the sale, after advertising in accordance to law, to Allen E. Lockerf as trustee for $45,000; that being the highest and best bid. Then follows an identical statement showing that the master had paid out the court costs and master's fees and that Allen E. Lockerf as trustee, the purchaser at the sale, had executed a receipt to the master for $11,755.70. Jim Parker, in her intervening petition, claims her proportionate share of this last named item.

Of course if the sale of the premises by the master was for cash, as the master contends, then the prayer of her petition

should be allowed; but if the sale was not for cash but was only bid in by the complainant for the benefit of the bondholders, and he executed his receipt to the master in satisfaction or part satisfaction of the amount due him, then the petition was properly dismissed.

From the facts we have above set forth, and which are wholly undisputed, it is obvious that the petitioner's claim that the property was sold for cash is utterly baseless. The complainant trustee paid no money to the master for the property, and the intervening petitioner's claim is wholly without merit.

The order of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

should be allowed, but if the made was use for some but was only left in by the requirement for the benefit of the conditions, and he concluded his opinion to the answer in satisfaction of just satisfaction of the amount due him, then the petition was properly dismissed.

From the facts as have been set forth, and which are mostly undisputed, it is obvious that the petitioner's claim that the property was sold for cash is utterly baseless. The respondent not trusts paid no money in the market for the property, and the interpleading petitioner's sheriff is wholly without merit.

The order of the Superior Court of last county is affirmed.

AFFIRMED.

Bellevell, C. J., and Bellevell, J., concur.

36833 to 36882 CONSOLIDATED CASES.

152

BERT NEWTSON, et al.,
Appellees,

vs.

JOSEF WAGNER, Sr.,
Appellant.

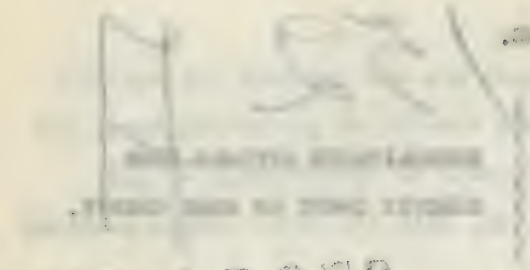
CONSOLIDATED APPEALS FROM
CIRCUIT COURT OF COOK COUNTY.

272 I.A. 627

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Eighty-two persons engaged in farming and dairying in the vicinity of Plano, Illinois, brought 82 suits before a Justice of the Peace of Cook county, to recover several amounts claimed to be due them for milk they claimed they had sold and delivered to the defendant, Josef Wagner, Sr. In 4 of the cases judgments were entered in favor of the plaintiffs, and in the remaining 78 cases the judgments were for defendant. Forty-eight plaintiffs appealed to the Circuit court of Cook county and the defendant appealed from the 4 judgments rendered against him to the same court. Two of the cases appealed by plaintiffs were dismissed for want of prosecution; the remaining 50 cases were tried before the court without a jury and there was a finding and judgment in each case in favor of the plaintiff, and the defendant appeals. The cases have all been submitted on one set of abstracts and briefs. Just why it was necessary to incur the expense of appealing 50 cases when one would have been sufficient, we are unable to understand. The defendant should have made a motion in each case but the one appealed from to vacate the judgments; these motions then should be entered of record and continued until the determination of the case on appeal, when the motions could then be disposed of and judgments entered in each case, following the judgment entered in the case appealed from.

The record discloses that the plaintiffs lived in the vicinity of Plano, Illinois, and were engaged in farming and dairying,



and some time in the early part of June, 1926, Joseph Wagner, Jr., a man then about 23 years of age, and son of the defendant Josef Wagner, Sr., went in his automobile from Chicago to Cicero, to Plano seeking to buy milk; he met a few men near Plano who were engaged in the milk business, and discussed the question of buying milk in that vicinity, and it was agreed that shortly thereafter the Plano parties would call on Wagner in Cicero. The evidence further shows that the defendant, Josef Wagner, Sr., was engaged in the milk business in Cicero for a number of years, his place of business being at 5407 West 24th street, Cicero, Illinois; that his sons, Frank and Joseph, Jr., had been in business with him; that a few days after Joseph, Jr., had his talk, above mentioned, with the men at Plano, one of them told him they would come to Chicago to look into the matter of selling milk, and the next day Joseph Wagner, Jr., sent his automobile and driver to Plano and three of the Plano men were brought to the Cicero plant; that they talked with the defendant, Josef, Sr., at his place of business in Cicero, and afterward he took them to the McKinley Park Dairy and another dairy in or near Cicero; that later on the same day they saw Joseph Wagner, Jr., at his home at the Annette hotel in Cicero. The evidence is further to the effect that they talked prices, and about a day thereafter a truck belonging to the defendant or to his son Joseph, went to Plano as per arrangement and got some milk at a platform erected near Plano. A number of dairymen had been solicited by men in that vicinity to sell their milk to Wagner and they brought it in to the platform near Plano, where it was delivered and taken by either the defendant's or his son's truck to Cicero; this continued for about a month. None of the dairymen has as yet received as much as one cent for the milk he sold. After about a month, when no payment had been received, they came to Chicago, saw defendant and demanded payment.

Mr. John Wagner, Jr., a man then about 22 years of age, and son of the defendant Sigmund Wagner, Sr., went to his neighbor's farm adjoining on Sunday, to Plano seeking to buy milk; he had a few cows that Plano was engaged in the milk business, and discussed the question of buying milk in that vicinity, and it was agreed that shortly thereafter the Plano partner would call on Wagner in Sterry. The evidence further shows that the defendant, Sigmund Wagner, Sr., was engaged in the milk business in Sterry for a number of years, his place of business being at about two miles, Sterry, following; that his son, Frank and Jacob, Jr., had been in partnership with him; that a few days after Wagner, Jr., had the talk, above mentioned, with the man in Plano, one of them told his father they would go to Sterry to look into the matter of selling milk, and the next day Joseph Wagner, Jr., and his partnership was driven to Plano and there met the Plano man from Brooklyn by the Sterry plant; that they talked with the defendant, Sigmund, Sr., at his place of business in Sterry, and afterward in from Plano in the building that Sterry and another dairy in or near Sterry; that later on the same day they saw Joseph Wagner, Jr., at his home at the Sterry motel in Sterry. The evidence is further to the effect that they talked price, and about a day thereafter a truck belonging to the defendant or to his son Frank, went to Plano on an errand and on that same milk at a platform erected near Plano. A number of witnesses for them testified to seen in that vicinity in all their milk is Wagner and they proved it be to the plaintiffs near Plano, where it was delivered and taken by either the defendant's or his son's trucks to Sterry; this continued for about a month. None of the witnesses was so per respected as much as one cent for the milk he sold. After about a month, when he learned that Plano was entirely out from in Sterry, was informed and insisted payment.

He ordered them out of his place of business and said that the milk had been purchased by his son Joseph and that he had nothing to do with it.

There is only one question controverted in this case, and that is whether the milk was sold to the defendant or to his son, Joseph, Jr. That the milk was sold and delivered and not paid for is undisputed.

The evidence tending to prove the controverted point in the case is sharply conflicting; much of it is in direct conflict and cannot be reconciled. The trial Judge, who saw and heard the witnesses, stated it was clear to him that either the witnesses for plaintiffs or those for the defendant were lying.

The substance of plaintiffs' evidence was that when Wagner, Jr., first went to Plano to negotiate for the milk he said that he and his father were in the dairy business in Cicero and that some of the Plano people should investigate their standing before any agreement was made; that thereafter three of the Plano people came to Cicero in Joseph, Jr.'s car and were taken to Josef, Sr.'s plant; that they there talked to Josef, Sr., which he admits. Their testimony is to the effect that after discussing the price and quality of milk, defendant, Josef, Sr., said the Wagner Dairy would take all the milk they could get from Plano. This is denied by the defendant; he admits they came to his plant but says he never agreed to buy any milk from them; that the proposal to buy milk was by his son Joseph.

The undisputed evidence shows that at that time Josef, Sr., took the three men to the McKinley Park dairy and another dairy company which dealt in milk. Joseph Pavelka was the manager of the McKinley Park Dairy; he testified, for defendant, that defendant and the Plano parties called at his place of business; that the talk was that the Plano people were going to sell their milk to Joseph, Jr.; that he said Joseph, Jr., was too young and irresponsible to handle

He undoubtedly knew out of his class of business and said that the milk had been purchased by his son Joseph and that he had nothing to do with it.

There is only one question unanswered in this case, and that is whether the milk was sold to the defendant or to his son, Joseph, Jr. That the milk was sold and delivered and not milk was in controversy.

The evidence tending to prove the contraverted point in the case is sharply conflicting; much of it is in direct conflict and cannot be reconciled. The trial judge, who saw and heard the witnesses, stated it was clear to him that either the witnesses for plaintiffs or those for the defendant were lying.

The substance of plaintiffs' evidence was that some Tuesday, Jr., first went to Flemo to negotiate for the milk so said that he and his fathers were in the dairy business in Glenco and that some of the Flemo people should negotiate their selling before any agreement was made; that thereafter three or the first people came to Glenco in Jacob, Jr.'s and here talked to Jacob, Jr.'s father, Jr.'s father; that they then talked to Jacob, Jr., which he admits. Jacob Ensmingy is to the effect that after discussing the price and quality of milk, defendant, Jacob, Jr., said the Kapper dairy would take all the milk they could get from them. This is denied by the defendant; he admits that some in his place but says he first wanted to see how milk from them: that the proposal to buy milk was by his son Joseph.

The undisputed evidence shows that at that time Jacob, Jr., had the three men in the creamery that dairy and another dairy company which dealt in milk. Joseph Ensmingy was the president of the corporation that dairy; he testified, for defendant, that defendant and the Flemo partners called at his place of business; that the talk was that the Flemo people were going to sell their milk to Joseph, Jr.; that he said Joseph, Jr., was too young and irresponsible to handle

so much money, and that if he bought milk he would buy it from the Plano people direct; that defendant said something also to this effect, and thereupon some one suggested that defendant Josef, Sr. leave because he was injuring Joseph, Jr.'s business. Of course this story is grotesque. The Plano people did not know any of the parties - had just met them that day except Joseph, Jr., whom they met a few days before they came to Cicero to look into the situation and see that the concern to which they sold their milk was responsible; and yet, according to this evidence, plaintiffs agreed to sell large quantities of milk to Joseph, Jr.

There is further evidence in the record to the effect that defendant, Josef, Sr., at least on one occasion was at Plano during the period ~~xx~~ the milk was being delivered, and some of the men there discussed the sale of the milk with him; and the evidence is to the effect that it was understood by all parties that he was the purchaser of the milk. This is denied by defendant.

There is a great deal of other evidence in the record, all of which we have carefully considered. We think it would serve no useful purpose to discuss it here, for we are clearly of the opinion that whether the milk was sold to defendant or to his son was a question to be determined by the trial Judge, who saw and heard the witnesses and was in a much better position to determine the truth of the controversy than are we, sitting in a court of review and having but the printed page before us. He found in favor of plaintiffs' version, and we are unable to say, after a careful consideration of all the evidence, that his finding is against the manifest weight of the evidence. In these circumstances, we are not warranted, under the law, in disturbing the findings and judgments. Moreover, shortly after the Plano people stopped delivering the milk in July because they had not been paid, one of the sellers of the milk brought suit against the defendant, Josef Wagner, Sr., before a Justice of the

so much money, and that if he bought milk he would buy it from the farmer myself direct; that defendant said something also to this effect, and irrespective some one suggested that Lawrence Lopez, Jr., Esqre Deputy be was the Intending Lessee, Jr.'s business. Of course this apply is speculation. The Plaintiff always did not agree on at the parties - that just was what that Lawrence, Jr., when they met a few days before they came to Court to look into situation and see that the contract to which they said their milk was performability; and yet, according to this evidence, plaintiffs offered to sell large quantities of milk to Lawrence, Jr.

There is varied evidence in the record as to the effect that defendant, Lopez, Sr., at least on one occasion was at times during the period of the milk was being delivered, and with at the last time disposed the milk of the milk with him; and his evidence is to the effect that it was concerned by all parties that he was the purchaser of the milk. This is denied by defendant.

There is a great deal of other evidence in the record, all of which we have carefully considered. We think it would serve no useful purpose to discuss it here, for we are clearly of the opinion that whether the milk was sold to defendant or to his son was a question to be determined by the trial Judge, who has had before the witnesses and was in a much better position to determine the truth of the controversy than are we, sitting in a court of review and having but the printed page before us. We found in lieu of plaintiff's version, and we are unable to say, after a careful consideration of all the evidence, that his finding is against the preponderance of the evidence. In these circumstances, we are not warranted, under law, in disturbing the finding and judgment. However, shortly after the trial was ended plaintiff's counsel filed a motion for leave to amend his petition, and at the request of the milk brought suit against the defendant, Lopez Sawyer, Sr., seeking a judgment

Peace, which was appealed to the Circuit court of Cook county and there tried before Judge Caverly of that court, and there was a finding and judgment in the plaintiff's favor, which on appeal to this court was affirmed. Budd v. Josef Wagner, Sr., 255 Ill. App. 523.

The amounts of the judgments in the 50 cases run from $8.50 to $236.30.

The defendant in his brief says: "This case is to be disposed of according to the principles and rules to be found in 'Uniform Sales Act,'" and then refers to certain sections of that Act. But nowhere in the argument is anything said as to any application of the Uniform Sales Act to the case before us. Of course we are not supposed to search through the Act to find out whether it has been violated. Nor is there any merit in the contention that the plaintiffs' claims were barred by the Five Year Statute of Limitations. All of the suits were brought within five years before any payment was due to plaintiffs for the milk.

The judgments of the Circuit court of Cook county, and each of them, are affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Jones, which was attached to the flight court of this county and State sitting before three judges instead of just court, and there was a finding and judgment in the plaintiff's favor, which is proved in this court was affirmed. Cole v. Lord Tumor, 2d Cir., 1929, 33F.

The amounts of the judgments in the 3d cases run from $3,00 to $200.00.

The defendant in its brief says: "This case is to be disposed of according to the principle and rules to be found in Qualitone Sales Co.," and then refers to certain opinions of this Court. But nowhere in the argument is anything said as to any opinion of the Supreme Court not in the case before us. If counsel we are not required to search through the Act to find out whether it has been violated. It is their duty merit in the petitioner that the "Qualitone" claims were issued by the Air Tour Sales of Qualitone. All of the suits were brought within the period before any appeal was due to plaintiffs for the suit.

The judgments of the Circuit Court of Cook County, and each of them, are affirmed.

AFFIRMED.

Mahoney, P. J., and Matchett, J., concur.

153 H

36897

MAX OSWALD,
Appellee,

v.

MARY COURTNEY, doing business as M. Courtney & Sons,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

272 I.A. 627

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by him through the negligence of defendant's chauffeur in driving her truck, as a result of which plaintiff was struck and severely injured. There was a verdict and judgment in plaintiff's favor for $12,000, and the defendant appeals.

The record discloses that about 4 o'clock on the afternoon of July 2, 1931, plaintiff, who was about 62 years of age, while crossing Adams street, an east and west street in Chicago, at a point about 40 or 50 feet west of Canal street, a north and south street, was struck by defendant's truck, which threw him to the pavement and ran over his legs, as a result of which it was necessary to amputate one of them below the knee.

The substance of plaintiff's evidence is that just before the accident he was on the north sidewalk of Adams street about 40 or 50 feet west of Canal street, and started south or southeasterly across Adams street for the purpose of going to the Union station which is located immediately across the street; that he walked out into the roadway of Adams street,

No. 4

SIX MONTHS,

Appellees,

v.

[illegible], alias
Wrathers on St. Charlemagne
& Sons,

Appellant.

AMERICAN MOTOR INSURANCE COMPANY,

COOK COUNTY.

272 I.A. 627

Mr. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover damages for personal injuries claimed to have been sustained by him through the negligence of defendant's chauffeur in driving her truck, as a result of which plaintiff was struck and severely injured. There was a verdict and judgment in plaintiff's favor for $18,000, and the defendant appeals.

The evidence discloses that about 4 o'clock on the afternoon of July 2, 1931, plaintiff, who was about 22 years of age, while crossing Adams street, on north and west bound in Chicago, at a point about 40 or 50 feet east of Canal street, a north and south street, was struck by defendant's truck, which threw him to the pavement and ran over his legs, as a result of which it was necessary to amputate one of them below the knee.

The substance of plaintiff's evidence is that just before the accident he was on the north sidewalk of Adams street about 40 or 50 feet west of Canal street, and started south or southeastically across Adams street for the purpose of going to the Union station which is located immediately across the street; that he walked out into the roadway of Adams street,

in which there is a double line of street car tracks, and stopped about 2 or 3 feet north of the westbound track to permit a westbound street car to pass; that just after the street car passed plaintiff saw the truck in question, which had been coming north in Canal street, turn west into Adams street "cutting the corner;" that at that time the truck was from 50 to 75 feet from him; that the speed of the truck was increased as it made the turn and it was traveling from 15 to 18 miles an hour; that plaintiff thought it would pass to the north of him, but suddenly found it was bearing down upon him, and in an endeavor to get out of the way, took one or two steps forward, when he was struck, thrown to the pavement and two wheels of the truck passed over his legs. There is some uncertainty in the evidence as to whether it was the north or the south wheels of the truck that passed over his legs.

The defendant's version, as testified to by the chauffeur, who was somewhat corroborated by his helper, (who was riding on the seat of the truck) and another witness, that he was driving a two and one-half ton truck, in which there were about 50 watermelons, north in Canal street near the center of the street; that when he reached Adams street, he turned to go west and saw plaintiff standing on the sidewalk at the north curb of Adams street about 40 or 50 feet west of Canal street; that after he turned the corner he increased the speed and was traveling about 12 to 15 miles an hour; that the street declines from Canal street to Clinton street, which is the next north and south street; that the truck was following a westbound street car and was in that track or straddling the north rail of it; that he first saw plaintiff when he was about 25 feet away standing at the curb; that when he was about 10 feet from him, plaintiff started to walk rapidly south across Adams street directly in front of the truck; that he sounded his horn

in which there is a double line of mixed car tracks, one stopped about 2 or 3 feet north of the westbound track to permit a westbound street car to pass; that after the street car passed plaintiff saw the truck in question, which had been coming north on Grand avenue, turn over into street "parking the security" that at that time the truck was from 40 to 70 feet from him; that the speed of the truck was increased as it neared the car and it was traveling from 35 to 38 miles an hour; that plaintiff thought it would pass to the north of him, but suddenly found it was bearing down upon him, and in an endeavor to get out of the way, both cars at the same instant, when he was struck, thrown to the pavement and the wheels of the truck passed over his legs. There is some uncertainty in the evidence as to whether it was the north or the south wheels of the truck that passed over his legs.

The defendant's version, as testified to by the chauffeur, who was somewhat corroborated by his helper, (who was riding on the seat of the truck) and another witness, that he was driving a two and one-half ton truck, on which there were about 70 bushels, in Grand street from the center of the street; that when he reached Adams street, he turned to go west and saw plaintiff standing on the sidewalk in the south end of Adams street about 40 or 50 feet west of Grand avenue; that after he turned the corner he increased the speed and was traveling about 15 to 17 miles an hour; that the street railway from Grand street down to Jefferson street, which is the east north and south street from the truck was railroaded a westbound street car and was in that track or straddling the south rail of it; that he first saw plaintiff when he was about 10 feet away standing at the curb; that when he was about 10 feet from him, plaintiff started to walk briskly south, throw himself directly in front of the truck; that he endeavored his best

and applied the brakes but was unable to stop in time, and the right front corner of the truck struck plaintiff, threw him down, and the two north wheels ran over plaintiff's legs.

There is other evidence to the effect that when plaintiff fell his head was toward the south. Other witnesses testified, some of them substantiating plaintiff's version and others the defendant's version of the matter.

The defendant contends that plaintiff "was guilty of contributory negligence as a matter of fact and of law." In a case of this kind, the general rule of law is that whether plaintiff is guilty of contributory negligence and whether the defendant was guilty of negligence are questions of fact for the jury. If there be any difference of opinion on these questions so that reasonable minds may not arrive at the same conclusion, then the questions are for the jury. Louthan v. Chicago City Ry. Co., 198 Ill. App. 329; Kelly v. Chicago City Ry. Co., 283 Ill. 640. We have carefully considered all the evidence in the record, the substance of which we have heretofore mentioned, and are of opinion that whether plaintiff was guilty of contributory negligence and whether the defendant was guilty of negligence, were questions for the jury.

As stated, plaintiff's evidence tended to show that he was in the roadway of Adams street about 40 or 50 feet west of Canal street and 3 feet north of the north rail of the westbound track; stopped to let a westbound street car pass, and then saw the truck 50 or 75 feet away, turning around the corner coming toward him. He thought the truck would pass to the north of him, but suddenly found it bearing down upon him and in an endeavor to get out of the way, stepped forward one or two steps when he was struck.

In these circumstances we think it cannot be said that plaintiff's conduct was "so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did." Kelly v. Chicago City Ry. Co., supra. And while it is true that had plaintiff stepped backward instead of forward he might have escaped injury, yet we think this fact ought not to bar a recovery. As said in Wesley City Coal Co. v. Healer, 84 Ill. 126: "It has long been settled, that a party having given another reasonable cause for alarm can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm." And in Chicago and Alton R. R. v. Becker, 76 Ill. 25, it was also said (p. 31) that "In such a case, it would be against the common judgment of mankind to hold the injured party either morally or legally responsible for contributory negligence."

We are also of the opinion that under defendant's version of the matter, as testified to by her witnesses, the question whether the defendant was guilty of negligence and whether the plaintiff was guilty of contributory negligence, were for the jury to decide. We are further of the opinion that we would not be warranted, under the law, in disturbing the verdict of the jury, confirmed as it was, by the trial judge on the ground that the finding and judgment are against the manifest weight of the evidence. The Judge and the jury saw the witnesses, heard them testify and were in a much better position to determine the truth of the matter than we are in a court of review, where we have but the printed page before us.

The defendant further contends that counsel for plain-

tiff made improper remarks in his arguments to the jury. We have considered the contention made and are clearly of the opinion that there was nothing that would warrant us in disturbing the verdict of the jury on this ground.

Complaint is also made by defendant to the giving of an instruction at the request of plaintiff. The instruction quoted sec. 40, of the Motor Vehicle Act, (chap. 95a) Cahill's statutes, which provides that an operator of a motor vehicle approaching a person walking upon a public highway shall give reasonable warning of his approach and use every reasonable precaution to avoid injuring such person and if necessary to stop the motor vehicle and then told the jury in substance that if they believed from a preponderance of the evidence that plaintiff was in the exercise of ordinary care, as the motor vehicle approached the place where he stood, and that the driver of the truck saw plaintiff, and if by exercising ordinary care he could have stopped the motor vehicle and failed to do so, and that such failure was the direct and proximate cause of the accident, then the verdict should be for the plaintiff. The argument against this instruction is that since there was some evidence that the chauffeur did not blow his horn at the time in question, the jury might assume that he had violated the Statute and therefore defendant was liable, notwithstanding that there was no necessity for sounding the horn, since all the evidence showed plaintiff saw the automobile.

Other objections were made to this instruction but we think none of them would warrant us in disturbing the verdict of the jury even if the instructions were held to be technically inaccurate. The issues were simple and clearly understood. Moreover, the court, at the request of the defendant, instructed the jury in substance that if a person crossing a street sees an

the jury in substance that if a person operating a motor car
negligently, in the judgment of the defendant's instructor
instructor. The issues were simple and clearly mentioned.
the jury even if the instructions were held to be technically
right when of them would amount to in interfering the testing of
all the evidence about plaintiff was the motorcycle.

Other objections were made to this instruction but no
appearing that there was no necessity for removing the horn, since
had been at the time in question, the jury might assume that he had
violated the statute and therefore defendant was liable, notwith-
there since there was some evidence that the operator did not blow
for the plaintiff. The defendant objected this instruction in
and prejudicial error of the motorcycle, since the verdict should be
vehicle and failed to do so, and that such failure was the direct
by exercising ordinary care to avoid injury, negligent the motor
be found, and that the driver of the horn was negligent, and if
of driving away, so the mere relative distances the place where
of the motorcycle and the car, it would be a question to avoid im-
jurious collision, upon a proper defense, could give reasonable warning
the jury in substance that if a person operating a motor vehicle
and then told the jury in substance that if they believed from a
preponderance of the evidence that plaintiff was in the exercise
and proximate cause of the accident, then the verdict should be
for the plaintiff. The defendant objected this instruction in
that since there was some evidence that the operator did not blow
the horn at the time in question, the jury might assume that he had
violated the statute and therefore defendant was liable, notwith-
standing that there was no necessity for sounding the horn, since
all the evidence about plaintiff was motorcycle.

automobile coming, then there is no necessity for sounding a horn.

We have considered the instructions as a whole and are clearly of the opinion that defendant was not prejudicially affected by any of them. The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., concurs;
McSurely, J., dissents.

8652

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of May in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8652 Agenda No. 17.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1933.

The People of The State of Illinois,

Defendant in error

vs.

Samuel Wade and Henry Fritzinger, (Henry Fritzinger,

Plaintiff in error)

Writ of Error, Circuit Court of LaSalle County.

WOLFE -- P.J.

This case was certified to this court by the Supreme Court. The opinion of the Supreme Court is found in Volume 351 Ill., page 484. With the exception that the principal to the bail bond had died instead of surrendering to the warden of the penitentiary, the facts and circumstances are the same in this case as in the case of the People of the State of Illinois vs. Frank Le Roy Lawson and Henry Fritzinger, general No. 8651, agenda No. 16.

For the reasons set forth in the opinion in that case, the judgment of the Circuit Court of LaSalle County is hereby affirmed.

Judgment affirmed.

Gen. No. 9452 August 30, 1917.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1917.

The People of The State of
Illinois,

Defendant in error

vs.

Ernest Wade and Henry Fritzinger,
Henry Fritzinger,

Plaintiff in error)

Writ of Error, Circuit Court
of LaSalle County.

MOORE -- P.J.

This case was certified to this court by the Supreme Court. The opinion of the Supreme Court is found in Volume 276 Ill., page 484. With the exception that the principal in the 2nd degree had died instead of surrendering to the warden of the penitentiary, the facts and circumstances are the same in this case as in the case of the People of the State of Illinois vs. Frank Le Roy Lawson and Henry Fritzinger, General No. 8981, Appeals No. 12.

For the reasons set forth in the opinion in that case, the judgment of the Circuit Court of LaSalle County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

1657

51

A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 628

BE IT REMEMBERED, that afterwards, to-wit: On OCT 24 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8657 Agenda No. 22

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D., 1933.

CECILE MARTIN, (Plaintiff) Appellee,	)	
vs	)	Appeal from Circuit Court, Kane County.
Cable PIANO COMPANY, a Corporation. (Defendant) Appellant,	)	

WOLFE - P. J.

This case comes to this court on appeal from the Circuit Court of Kane County. Cecile Martin, the appellee, brought suit in said court against the Cable Paino Company, a corporation, for damages for a breach of contract. The case was tried before a jury who found in favor of the plaintiff and assessed her damages at the sum of $650.00.

The declaration consisted of the common counts and one special count, to which was attached an affidavit of claim, which is as follows: "W. C. O'Brien, being first duly sworn, says that the demand of the plaintiff in the above entitled cause is for damages for breach of an oral contract between the plaintiff and the defendant, made in November, 1928, whereby the defendant agreed to give to the plaintiff a credit of $695.00 on the purchase price of a piano, and to enter into a written contract whereby plaintiff was to buy of the defendant and the defendant was to sell to the plaintiff a piano at a price to be $695.00 less than the market price, which contract the defendant repudiated and refused to perform and that there is due to the plaintiff

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

May Term, A. D., 1933.

GECILE MARTIN, (Plaintiff) Appellee, vs. Cable PIANO COMPANY, a Corporation, (Defendant) Appellant,	Appeal from Circuit Court, Kane County.

MULLIN - P. J.

This case comes to this court on appeal from the Circuit Court of Kane County. Cecile Martin, the appellee, brought suit in said court against the Cable Piano Company, a corporation, for damages for a breach of contract. The case was tried before a jury who found in favor of the plaintiff and assessed her damages at the sum of $600.00.

The declaration consisted of the common counts and one special count, to which was attached an affidavit of claim, which is as follows: "W. O. O'Brien, being first duly sworn, says that the demand of the plaintiff in the above entitled cause is for damages for breach of an oral contract between the plaintiff and the defendant, made in November, 1928, whereby the defendant agreed to give to the plaintiff a credit of $605.00 on the purchase price of a piano, and to enter into a written contract whereby plaintiff was to buy of the defendant and the defendant was to sell to the plaintiff a piano at a price to be $605.00 less than the market price, which contract the defendant repudiated and refused to perform and that there is due to the plaintiff

from the defendant, after allowing to it all just credits, deductions and set-offs, $695.00".

This case was before this court at the October Term, 1931, and is reported in Vol. 263 Appellate, at page 262, at which time the case was reversed and the cause remanded for a new trial. At the former trial the pleadings of the plaintiff consisted of the common counts and affidavit of claim, which was in substance in the same language as the affidavit of claim in this suit. To the affidavit of claim in the first suit has been added the words, "give to the plaintiff a credit of $695.00 on the purchase price of a piano and to enter into a written contract whereby the plaintiff was to buy, etc., of the defendant, and the defendant was, etc."

An examination of the evidence in this case discloses that it is nearly identical to that of the former trial. In our former opinion the evidence of the different witnesses is set forth, and for that reason we do not deem it necessary to state the evidence. In commenting upon the facts in the case, we said, "An examination of the record discloses a total absence of proof of repudiation. There is not even a claim of repudiation. The plaintiff never even made an offer to carry out her part of the contract. It is admitted by both parties that the credit of $645.00 was to be allowed upon the purchase of a new piano. Plaintiff was never ready and willing to buy and accept delivery of a new piano. On the other hand, defendant was never called upon to perform its part of the contract and, although it appears from the evidence it was at all times ready to perform its part, the plaintiff would not permit it to do so by failing to provide a place for delivery of a new piano and by making default in payments.

It is a matter of no moment that the piano originally purchased by the plaintiff was unsatisfactory, for she admitted she afterwards came to an agreement with defendant whereby she was permitted to return the piano and be allowed a credit of $645.00 on another piano to be thereafter purchased by her. Defendant did not agree to pay

from the defendant, after allowing to it all just credits, deductions and set-offs, $695.00".

This case was before this court at the October Term, 1931, and is reported in Vol. 253 Appellate, at page 282, at which time the case was reversed and the cause remanded for a new trial. At the former trial the pleadings of the plaintiff consisted of the common counts and affidavit of claim, which was in substance in the same language as the affidavit of claim in this suit. To the affidavit of claim in the first suit has been added the words, "give to the plaintiff a credit of $695.00 on the purchase price of a piano and to enter into a written contract wherein the plaintiff was to buy, etc., of the defendant, and the defendant was, etc."

An examination of the evidence in this case discloses that it is nearly identical to that of the former trial. In our former opinion the evidence of the different witnesses is set forth, and for that reason we do not deem it necessary to state the evidence. In commenting upon the facts in the case, we said, "An examination of the record discloses a total absence of proof of repudiation. There is not even a claim of repudiation. The plaintiff never even made an offer to carry out her part of the contract. It is admitted by both parties that the credit of $695.00 was to be allowed upon the purchase of a new piano. Plaintiff was never ready and willing to buy and accept delivery of a new piano. On the other hand, defendant was never called upon to perform its part of the contract and, although it appears from the evidence it was at all times ready to perform its part, the plaintiff would not permit it to do so by failing to provide a place for delivery of a new piano and by making default in payments.

It is a matter of no moment that the piano originally purchased by the plaintiff was unsatisfactory, for she admitted she afterwards came to an agreement with defendant whereby she was permitted to return the piano and be allowed a credit of $695.00 on another piano to be thereafter purchased by her. Defendant did not agree to pay

her any cash. It merely agreed to make her a cash allowance for the old piano upon the purchase of a new one. She made a payment on this new agreement and thereafter failed to carry out her part of the contract. It was she who repudiated the contract and not the defendant. This suit is for a breach of the contract by the defendant. No breach by it was proven."

The declaration charges the defendant with a breach of the contract; that the defendant refused to enter into a written contract; that the plaintiff was ready and willing to select a piano and sign a contract for the same, but that the defendant repudiated said oral contract and denied the existence of the same, and refused to perform its obligation under the said oral contract, whereby the plaintiff was damaged.

It is our opinion that the appellee has failed to prove the material allegation of her declaration, and the language used by us in our former opinion is applicable to the facts as presented in this case. The judgment of the circuit court of Kane County is reversed.

Reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

9063

52

A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 628

BE IT REMEMBERED, that afterwards, to-wit: On OCT 24 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8663 Agenda No. 25

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D., 1933.

ELLA MINEHAN COFFEY, Appellant, vs. LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION, a Corporation, and JOHN HENRY MALEY, Appellees.	Appeal from the Circuit Court, Knox County, In Chancery.

WOLFE - P. J.

The appellant filed her bill in the circuit court of Knox County against, John Henry Maley and the appelles, the Locomotive Engineers' Mutual Life and Accident Insurance Association, a corporation licensed to do business in the State of Illinois.

The purpose of the bill is to reform a certificate of insurance issued by said association to Joseph Minehan, deceased, wherein said Maley was named the beneficiary, and to change the benificiary to Ella Minehan Coffey, the appellant, and to compel the association to account for and pay the appellant the sum of $1500.00, the face value of the certificate.

The appellees answered the bill and deny that Joseph Minehan was of sound mind at the time he attempted to make a change of beneficiary named in the certificate, and that a valid change of beneficiary had been made by the insured according to the terms of the contract of insurance.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D., 1938.

ELLA MINGHAM COVERT, Appellant,	
vs.	Appeal from the Circuit Court, Knox County, In Chancery.
LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION, a Corporation, and JOHN HENRY HALLAT, Appellees.	

MOLTON - P. J.

The appellant filed her bill in the circuit court of Knox County against, from each of the appellees, the Locomotive Engineers' Mutual Life and Accident Insurance Association, a corporation licensed to do business in the state of Illinois.

The purpose of the bill is to reform a certificate of insurance issued by said association to Joseph Minghan, deceased, wherein said delay was named the beneficiary, and to change the beneficiary to Ella Mingham Covey, the appellant, and to compel the association to account for and pay the appellant the sum of $1000.00, the face value of the certificate.

The appellees answered the bill and denied that Joseph Mingham was of sound mind at the time he attempted to make a change of beneficiary named in the certificate, and that a valid change of beneficiary had been made by the insured according to the terms of the contract of insurance.

The cause was referred to the master in chancery by the court who found that a valid change of beneficiary had been made by the insured; the insured was of sound mind and memory at the time he executed the form designating a change of beneficiary; that the certificate of insurance should be reformed so that the beneficiary therein named should read, "Ella Minehan Coffey", instead of "John Henry Maley"; that the equities were with the appellant, and that the association should pay the appellant the sum of $1500.00.

Objections to the master's report were filed by the appellees, which were overruled by the master, and thereafter these objections were ordered to stand as exceptions to the report. They were argued before the Chancellor, who over-ruled the exceptions with regard to the mentality of the insured and sustained the finding that the insured was of sound mind on March 12, 1930, when he executed a blank form for the purpose of making a change of the beneficiary named in the certificate. The Chancellor sustained the appellees exceptions to the report which was directed to the question whether or not a valid change of beneficiary had been made by the insured and dismissed the bill.

The evidence shows that the Locomotive Engineers' Mutual Life and Accident Insurance Association, is a fraternal beneficiary association with its principal office in Cleveland, Ohio, with local divisions in various cities; that the insured was a member of the local division No. 644, located in Galesburg, Illinois, where the insured resided.

The certificate of insurance on its face states that the application for insurance, the certificate of insurance, and the by-laws of the association in force at the time of the issuance of the certificate, or as thereafter amended, form the basis of the contract between the association and the insured.

Section 18 of the constitution and by-laws of the association, reads as follows: "Sec. 18. A certificate holder of this association having designated his beneficiary or beneficiaries may change the same at his pleasure without notice to or consent of the benificiary or beneficiaries, by returning his certificate

The cause was referred to the master in chancery by the court who found that a valid change of beneficiary had been made by the insured; the insured was of sound mind and memory at the time he executed the form designating a change of beneficiary, that the certificate of insurance should be returned so that the beneficiary therein named should read, "Ella Wrenkum Dolley", instead of "Jim Henry Maley"; that the equities were with the appellant, and that the association should pay the appellant the sum of $1500.00.

Objections to the master's report were filed by the appellees, which were overruled by the master, and thereafter these objections were ordered to stand as exceptions to the report. They were argued before the Chancellor, who over-ruled the exceptions with respect to the mentality of the insured and sustained the finding that the insured was of sound mind on March 12, 1930, when he executed a blank form for the purpose of making a change of the beneficiary named in the certificate. The Chancellor sustained the appellees exceptions to the report which was directed to the question whether or not a valid change of beneficiary had been made by the insured and dismissed the bill.

The evidence shows that the Locomotive Engineers' Mutual Life and Accident Insurance Association, is a fraternal benefiary association with its principal office in Cleveland, Ohio, with local divisions in various cities; that the insured was a member of the local division No. 664, located in Salem, Illinois, where the insured resided.

The certificate of insurance on its face states that the application for insurance, the certificate of insurance, and the by-laws of the association in force at the time of the issuance of the certificate, or as thereafter amended, form the basis of the contract between the association and the insured.

Section 18 of the constitution and by-laws of the association, reads as follows: "Sec. 18. A certificate holder of this association having designated his beneficiary or beneficiaries may change the same at his pleasure without notice to or consent of the beneficiary or beneficiaries, by returning his certificate

or certificates to the Home Office, through the Insurance Secretary of the Division to which he belongs, and informing the Vice-President and General Secretary-Treasurer of changes desired by a written request over his own signature, on a form furnished by the Home Office and witnessed by an insured member, provided that the new beneficiaries shall come within the classes named in Section 1, for which a fee of twenty-five (25) cents will be charged for each $1,500.00 so changed. Any person or persons, whether named as beneficiary or beneficiaries, accepting such designation in a certificate or certificates issued by this Association do so upon the expressed terms or conditions contained in these by-laws.

"No change in beneficiary shall become effective unless and until such change is entered on the records of the Home Office of the Association, and a new certificate is issued; but when such change has been so entered and the new certificate has been issued such change shall relate back to the date of such request.

"When the certificate naming the newly designated beneficiary or beneficiaries has been issued it shall in every respect be considered as if it were the original certificate issued to the insured, and the certificate or certificates replaced thereby shall be considered as absolutely void for all purposes; and in the event that the designation of the new beneficiary or beneficiaries shall be invalid, in whole or in part, for any reason whatever, and no subsequent, other, or different designation shall be made such invalid designation shall not revive any previously issued certificate, but the proceeds of the certificate shall be payable in accordance with the rules prescribed in Section 1 of the Constitution and By-Laws of this Association for payment in the event of the death or disqualification of any or all of named beneficiaries."

It was stipulated by the parties that the form furnished by the association to change the beneficiary of a certificate, on March 12, 1930, was as follows:-

or certificates to the Home Office, through the Insurance Secretary of the Division to which he belongs, and informing the Vice-President and General Secretary-Treasurer of changes desired by a written request over his own signature, on a form furnished by the Home Office and witnessed by an insured member, provided that the new beneficiaries shall come within the classes named in Section 1, for which a fee of twenty-five (25) cents will be charged for each $1,000.00 so changed. Any person or persons, whether named as beneficiary or beneficiaries, assenting such designation in a certificate or certificates issued by this Association do so upon the expressed terms or conditions contained in these by-laws.

"No change in beneficiary shall become effective unless and until such change is entered on the records of the Home Office of the Association, and a new certificate is issued; but when such change has been so entered and the new certificate has been issued such change shall relate back to the date of such request.

"When the certificate naming the newly designated beneficiary or beneficiaries has been issued it shall in every respect be considered as if it were the original certificate issued to the insured, and the certificate or certificates replaced thereby shall be considered as absolutely void for all purposes; and in the event that the designation of the new beneficiary or beneficiaries shall be invalid, in whole or in part, for any reason whatever, and no assignment, other, or different designation shall be made such invalid designation shall not revive any previously issued certificate, but the proceeds of the certificate shall be payable in accordance with the rules prescribed in Section 1 of the Constitution and By-Laws of this Association for payment in the event of the death or disqualification of any or all of named beneficiaries."

It was stipulated by the parties that the form furnished by the association to change the beneficiary of a certificate, on March 12, 1930, was as follows:-

"LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION APPLICATION FOR CHANGE OF BENEFICIARY."

I, _____, Member of _____Division, _____, Protected under Certificate No. _____issued by the Locomotive Engineers' Mutual Life and Accident Insurance Association issued on the ___, day of _____ for $_____ do hereby request the same Association to change the beneficiary or beneficiaries on the above mentioned certificate to read as authorized by our laws.

From _____

To _____

_____

Witnessed by me this ____day of _____.

_____Ins. Sec. Division No. _____.

It was further stipulated by the parties that the association provided, on March 12, 1930, a form known as "Affidavit for a New Beneficiary Certificate," and that it was the proper form to be used for the purpose of changing the beneficiary where the original certificate had been lost. No statutory provision of a foreign state, nor charter provision of the association, governing the change of the beneficiary of a mutual beneficiary certificate were introduced in evidence.

For about three years before March 12, 1930, the insured had made his home with the appellant his sister. During this time the insured had been in ill health to some degree, and not able to work. The appellant had borne all of the expense of the lingering illness of the insured during the time he made his home with her. About six weeks before the death of the insured, which occurred on March 15, 1930, the insured was taken to St. Mary's Hospital in Galesburg, Illinois.

On March 12, 1930, the insured desired to make his will and requested the appellant to call L. Fred O'Brien, a practicing attorney of Galesburg, to come to the hospital. He came to the hospital on that date, and drew the will of the insured, which bequeathed all the proceeds of the certificate of insurance to the appellant. The will was duly admitted to probate in the county court of Knox County.

"LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT
INSURANCE ASSOCIATION APPLICATION FOR CHANGE OF
BENEFICIARY."

I, _____, member of _____ division,
_____, protected under Certificate No. _____ issued
by the Locomotive Engineers' Mutual Life and Accident Insurance
Association issued on the ___, day of _____ for $_____ do hereby
request the same association to change the beneficiary or beneficiaries
on the above mentioned certificate to read as authorized by our laws.

From _____

To _____

_____

Witnessed by me this ____day of _____.

_____ Div. Sec. Division No. _____.

It was further stipulated by the parties that the association
provided, on March 12, 1920, a form known as "Affidavit for a New
Beneficiary Certificate," and that it was the proper form to be used
for the purpose of changing the beneficiary where the original certifi-
cate had been lost. No statutory provision of a foreign state, nor
contract provision of the association, governing the change of the
beneficiary of a mutual beneficiary certificate was introduced in
evidence.

For about three years before March 12, 1920, the insured had
made his home with the appellant his sister. During this time the
insured had been in ill health to some degree, and not able to work.
The appellant had borne all of the expense of the lingering illness
of the insured during the time he made his home w th her. About six
weeks before the death of the insured, which occurred on March 15, 1920,
the insured was taken to St. Mary's Hospital in Galesburg, Illinois.

On March 12, 1920, the insured desired to make his will and
requested the appellant to call L. Fred O'Brien, a practicing attorney
of Galesburg, to come to the hospital. He came to the hospital on
that date, and drew the will of the insured, which bequeathed all the
proceeds of the certificate of insurance to the appellant. The will
was duly admitted to probate in the county court of Knox County.

At the time he asked Mr. O'Brien to draw his will the insured also requested him to execute a change of beneficiary named in the certificate of insurance making the appellant the beneficiary instead of John Henry Maley. Mr. O'Brien informed the insured that this was a matter for the association to take care of, but that if the insured would give him an order to call at the bank and get the certificate that he would bring the certificate with him; that he would get in touch with the proper office of the association, who would take care of that part of it. The insured gave Mr. O'Brien the order for the certificate and Mr. O'Brien brought the certificate to him.

On March 12, 1930, Mr. E. S. Kimpton the secretary-treasurer of the Galesburg Division, was called to the hospital. He brought with him Mr. Healey and Mr. R. J. Keefe who were also members of the local division. The insured informed these three gentlemen that he wanted his certificate changed so that his sister, the appellant herein, would be the beneficiary instead of John Henry Maley; that he wanted it made to his sister because he had lived with her for something like three years and owed her money. Mr. Kimpton produced a blank form of the association to be used where the certificate had been lost. Mr. Kimpton told the insured to sign the blank at the top and this was done by the insured. Kimpton, Healey and Keefe also signed the blank and they then took the paper from the room and Mr. Healey filled in the data which they deemed necessary to effect the change in the beneficiary.

When so signed and filled out the document appears as follows:

"AFFIDAVIT FOR A NEW BENEFICIARY CERTIFICATE IN THE LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION."

State of Illinois.)
Knox County.)ss. Joseph Minehan, being duly sworn, on oath,

says that he is a member of _____, Division No. 644 of the Locomotive Engineers' Mutual Life and Accident Insurance Association, at Galesburg, Ill., in said County and State, and that he was the holder and owner of Certificate No. 227272, issued by and under the seal of the Home Office of the Locomotive Engineers' Mutual Life

At the time he asked Mr. O'Brien to bring his wife the insured also requested him to execute a change of beneficiary owned in the certificate of insurance making the appellant the beneficiary instead of John Henry Haley. Mr. O'Brien informed the insured that this was a matter for the association to take care of, but that if the insured would give him an order to call at the bank and get the certificate that he would bring the certificate with him; that he would get in touch with the proper office of the association, who would take care of that part of it. The insured gave Mr. O'Brien the order for the certificate and Mr. O'Brien brought the certificate to him.

On March 12, 1920, Mr. R. A. Kimpton the secretary-treasurer of the Oglesburg Division, was called to the hospital. He brought with him Mr. Healey and Mr. T. Keefe who were also members of the local division. The insured informed these three gentlemen that he wanted his certificate changed so that his sister, the appellant herein, would be the beneficiary instead of John Henry Haley; that he wished it made to his sister because he had lived with her for some-thing like three years and owed her money. Mr. Kimpton produced a blank form of the association to be used where the certificate had been lost. Mr. Kimpton told the insured to sign the blank at the top and this was done by the insured. Kimpton, Healey and Keefe also signed the blank and they then took the paper from the room and Mr. Healey filled in the data which they deemed necessary to effect the change in the beneficiary.

When so signed and filled out the document appears as follows:

"APPLICATION FOR A NEW BENEFICIARY CERTIFICATE IN THE LOCOMOTIVE ENGINEERS' MUTUAL LIFE AND ACCIDENT INSURANCE ASSOCIATION."

State of Illinois.)
Knox County.) ss. Joseph Minehan, being duly sworn, on oath, says that he is a member of _____, Division No. 644 of the Locomotive Engineers' Mutual Life and Accident Insurance Association, at Galesburg, Ill., in said County and State, and that he was the holder and owner of Certificate No. 22V2V2, issued by and under the seal of the Home Office of the Locomotive Engineers' Mutual Life

and Accident Insurance Association, of Cleveland, Ohio, and that said certificate is _____, said certificate was made payable to John Henry Maley, Relationship Nephew, that he desires a new one issued in lieu thereof, made payable to Mrs. Ella Minehan Coffey, Relationship Sister, and in consideration of the issue of said new certificate, waives any claim he or the beneficiaries named thereon now, may or might have under his from Certificate _____, Division No. 644.

Subscribed and sworn to before me by said _____, this _____ day of March 12, A. D. 1930.

R. J. Keef, Div. 644 Ill. _____

F. C. Healey, 644 My Commission Expires _____

E. S. Kimpton, Secy-Treas. Div. 644.

(Seal)

On the evening of March 12, 1930, Mr. Kimpton as secretary-treasurer of the Locomotive Engineers' Mutual Life and Accident Insurance Association, local division No. 644, wrote a letter to the Home Office of the association informing the association that the insured wanted to have his policy changed over to his sister, the appellant; that not having a proper form he was using the form that he enclosed for lost policies as the circumstances required, and closed his letter hoping that this would answer the purpose. In this letter he enclosed the document which the insured had signed. This letter together with the enclosed document reached the home office of the defendant company on March 14th, 1930.

On March 17, 1930, the home office of the association sent a letter to Mr. Kimpton which is as follows:

March 17, 1930.

E. S. Kimpton, Ins. Sec'y Div. 644.
159 West 1st St.,
Galesburg, Ill.

Dear Sir and Brother:

This will acknowledge receipt of your letter of March 12th, wherein you enclosed the certificate and affidavit for a new Beneficiary Certificate of Brother Joseph Minehan, asking that

and Accident Insurance Association, of Cleveland, Ohio, one [illegible] certificate in _____, said certificate was made payable to John Henry Haley, beneficiary Brother, that he destroy a certain issued in lieu thereof, made payable to Mrs. Ella Minnehan Jordan, beneficiary Sister, and in consideration of the issue of said new certificate, waives any claim he or the beneficiaries named thereon now, may or might have under his from Certificate _____, Division No. 644.

Subscribed and sworn to before me by said _____, this _____ day of March 12, A. D. 1930.

F. J. Lopp, Div. 644 Ill. _____

F. O. Hosley, 644 Ir Conductor Engine _____

E. S. Kimpton, Secy-Treas. Div. 644.

(Seal)

On the evening of March 12, 1930, Mr. Kimpton as secretary-treasurer of the Locomotive Engineers' Mutual Life and Accident Insurance Association, local division No. 644, wrote a letter to the Home Office of the association informing the association that the insured would be over his policy changed over to his sister, his beneficiary; that not having a proper form he was using the form that he enclosed for lost policies as the circumstances required, and closed his letter hoping that this would answer the purpose. In this letter he enclosed the document which the insured had signed. This letter together with the enclosed document reached home office of the defendant company on March 14th, 1930.

On March 17, 1930, the home office of the association sent a letter to Mr. Kimpton which is as follows:

March 17, 1930.

E. S. Kimpton, Ins. Sec'y Div. 644.

[illegible] West 1st St.,

Delaware, Ill.

Dear Sir and Brother:

This will acknowledge receipt of your letter of March 12th, wherein you enclosed the certificate and affidavit for a new Beneficiary Certificate of Brother Joseph Minnehan, asking that

his beneficiary be changed.

As you state, you have not used the proper form and the same does not contain the signature of Brother Joseph Minehan, which is necessary before the change can be made in his beneficiary. We are herewith enclosing application for change of Beneficiary, with the desired change designated, hich we ask that Brother Minehan sign as the "insured" before an insured member, who shall sign as witness in space provided.

You understand this is required as per Section #18, page #168, and is for the purpose of protecting the wishes of each individual member.

Yours fraternally,

General Secretary-Treasurer.

This letter was mailed after the insured had died.

The appellant served a notice on Kimpton, the Secretary-Treasurer of the local division #644, notifying the association not to pay the amount due under the certificate to John Henry Maley, or to anyone else, but to pay the same only to the appellant. The appellant also mailed proofs of death to the association wherein she named herself as the beneficiary of the certificate. These proofs of death were received at the home office on March 21, 1930. On April 9, 1930 the association paid to John Henry Maley the full amount of the policy, $1500.00.

The insured had the right to change the beneficiary named in the certificate and the association could not deprive him of this right if he substantially complied with the laws of the association governing the method of changing the beneficiary. Voight vs. Kersten 164 Ill. 314.

Comparing the form of the asociation designated "Application for change of Beneficiary" with the form entitled "Affidavit for a new Beneficiary Certificate" as it appears on the record, the latter is substantially the same as the former when read in the light of by-laws of the association. We do not deem that it was necessary that the insured make his request for a change of beneficiary on the blank furnished by the association for that purpose. Certainly a copy of a blank pro-

his beneficiary be changed.

As you state, you have not used the proper form and the same does not contain the signature of Brother Joseph Glandon, which is necessary before the change can be made in the beneficiary. In the Doreith, enclosing application for change of beneficiary, with the desired change designated, which we ask that Brother Hinman sign as the "Insured" before an insured member, who shall sign as witness in space provided.

You understand this is required as per Section #18, page #18, only for the purpose of protecting the wishes of each individual member.

Yours fraternally,

Grand Secretary-Treasurer.

This letter was mailed after the insured had died.

The association earned a million on income, the security-Treasurer of the local division paid, satisfying the association and to pay the amount due under the certificate to John Henry Haley, or to anyone else, but to pay the same only to the appellant. The appellant also mailed proofs of death to the association wherein she named herself as the beneficiary of the certificate. These proofs of death were received at the home office on March 21, 1930. On April 9, 1930 the association paid to John Henry Haley the full amount of the policy, $1000.00.

The insured had the right to change the beneficiary named in the certificate and the association could not deprive him of this right if he substantially complied with the laws of the association governing the method of changing the beneficiary. Voight vs. Kersten 164 Ill. 314.

Comparing the form of the association designated "Application for change of Beneficiary" with the form entitled "Affidavit for a new Beneficiary Certificate" as it appears on the record, the latter is substantially the same as the former when read in the light of by-laws of the association. We do not deem that it was necessary that the insured make his request for a change of beneficiary on the blank furnished by the association for that purpose. Certainly a copy of a blank pro-

vided by the association, when properly executed, would serve for all purposes as one furnished by the association. Brotherhood of Railway Trainmen vs. Benson 45 Fed. (2nd) 421. (Compare Seffens vs. Carisch #208 N. W. #905 (Wis.).

The request in the blank sent to the association that a new certificate be issued containing the name of the appellant, was asking the association to do what Section 18 required, to issue a new certificate upon a change of the beneficiary. This request simply expressed what is implied in the form provided by the association for a mere change in the beneficiary.

The serious question in this case is whether the request for the change of the beneficiary was signed by the insured in the manner prescribed and contemplated by the terms of Section 18 of the constitution and by-laws of the association. Section 18, it may be first observed, states positively that the change of beneficiary shall not be effected until a new certificate is issued, thus it is clear that it is the design and purpose of the association that it should always be in contract relation with its members and that no person should have any claim against it as a proposed beneficiary unless named in a valid certificate held by a member of the association. The provisions of section 18 that the application for a change of beneficiary should be xxsigned by the insured and be properly witnessed was a necessary requirement to protect both the insured and the association.

It is clear that the sufficiency of the request for a change of the beneficiary was to be determined by the officers of the association at the home office. It is true the insured signed his name at the top of the blank form sent to the association. However, the officers of the association at the main office had no means of knowing, nor do we know of any legal requirements holding them bound to know, that the insured had in any manner signed the blank form; the letter which Kimpton wrote to the home office and which was enclosed with the blank form signed by the insured did not state that the insured had signed the request nor could such a conclusion be drawn from the letter which is as follows:

vided by the association, when properly executed, would serve for all purposes as one furnished by the association. Brotherhood of Railway Trainmen vs. Bowen 49 Tex. (Ind) 431. (Compare Dartmouth College vs. Dartmouth 4 Wheat. 4 Pet. 518 (Wis.).

The request in the blank sent to the association that a new certificate be issued containing the name of the appellant, was asking the association to do what Section 18 required, to issue a new certificate upon a change of the beneficiary. This request simply expressed what is implied in the form provided by the association for a mere change in the beneficiary.

The serious question in this case is whether the request for the change of the beneficiary was signed by the insured in the manner prescribed and contemplated by the terms of Section 18 of the constitution and by-laws of the association. Section 18, it may be first observed, states positively that the change of beneficiary shall not be effected until a new certificate is issued, thus it is clear that it is the design and purpose of the association that it should always be in contract relation with its members and that no person should have any claim against it as a designated beneficiary unless named in a valid certificate held by a member of the association. The provisions of section 18 that the application for a change of beneficiary should be signed by the insured and be properly witnessed was a necessary requirement to protect both the insured and the association.

It is clear that the sufficiency of the request for a change of the beneficiary was to be determined by the officers of the association at the home office. It is true the insured signed his name at the top of the blank form sent to the association. However, the officers of the association at the main office had no means of knowing, nor do we know of any legal requirements holding them bound to know, that the insured had in any manner signed the blank form; the letter which Kimpton wrote to the home office and which was enclosed with the blank form signed by the insured did not state that the insured had signed the request nor could such a conclusion be drawn from the letter which is as follows:

"Brotherhood of Locomotive Engineers

Division 644

Galesburg, Ill., March 12, 1930.

Mr. Jas. H. Cassell,

Dear Sir and Brother:

Joseph Minehan who is sick and in the hospital wishes to have his policy changed over to this sister Mrs. Ella Minehan Coffey. Not having the proper from I am using the enclosed form for lost policies as the circumstances requires. I have the signature of two members of Div. 644, as witness. Hoping this will answer the purpose, I am fraternally yours,

E. S. Kimpton, Secy-Treas.

Div. 644 B. of L. E.

We think that the association was not only justified, but bound as a reasonable protection for the insured and the association, to refuse to make the change of the beneficiary indicated in the form sent, because it did not appear from the said form that the insured had signed it.

Section 18 also provided that the change of beneficiary should be made on the books of the association. Whether this request be held to be imperative to effect a change of beneficiary or merely a ministerial act on the part of the association, the association had no right to make such change on its books, except upon the receipt of an application for a change of beneficiary signed by the insured.

We cannot, under the maxim, that equity regards that as done which ought to be done, enforce a vitally defective request for a change of beneficiary. In such case equity follows the law which, as has been indicated, regards such a purported change of beneficiary as of no effect. Hubler V. Modern Woodmen of America, 112 Neb. 1, 198 N. W. 448; Modern Woodmen of America v. Woodden, 49 Fed. (2nd) 941.

It is plain from the evidence in the case that the head officers of the association did not waive the requirements of section 18 that the request for a change of beneficiary should be signed by the insured. However, it is contended that Kimpton, the

"Brotherhood of Locomotive Engineers

Division 644

Galesburg, Ill., March 18, 1930.

Mr. Jas. H. Cassell,

Dear Sir and Brother:

Joseph Wickham who is sick and in the hospital wishes to have his policy changed over to this sister era, Ella Wickham Gately. Not having the proper form I am using the enclosed form for lost policies as the circumstances requires. I have the signature of two members of Div. 644, as witness. Hoping this will answer the purpose, I am fraternally yours,

E. S. Kimpton, Secy-Treas.

Div. 644 B. of L. E.

We claim that the association was not only justified, but bound as a reasonable proposition for the insured and the association, to refuse to make the change of the beneficiary indicated in the first act, because it did not appear from the said form that the insured had signed it.

Section 12 also provides that the change of beneficiary should be made on the books of the association. Whether this request was held to be imperative to effect a change of beneficiary or merely a ministerial act on the part of the association, the association had no right to make such change on its books, except upon the receipt of an application for a change of beneficiary signed by the insured.

We cannot, under the maxim, that equity regards that as done which ought to be done, enforce a validly defective request for a change of beneficiary. In such case equity follows the law which, as has been indicated, requires such a particular manner of beneficiary as or no effect. Mabie v. Modern Woodmen of America, 112 Wis. 1, 108 N. W. 446; Modern Woodmen of America v. Wadden, 49 Ind. App. 441.

It is plain from the evidence in the case that the head officers of the association did not waive the requirements of section 12 that the request for a change of beneficiary should be signed by the insured. Moreover, it is contended that Dayton, the

the secretary of local division No. 664, waived the requirements of section 18, and that the association is bound by such alleged waiver by Kimpton.

Under the by-laws of the association Kimpton's duties were to keep a list of the members and inform the main office of the association of the members in good standing belonging to his division. He was also to receive all assessments and certificate fees paid by members of his division and remit them to the home office. He had nothing to do with the changing of b neficiaries named in the certificates of the association, except to forward the request for a change of beneficiary and the old certificate to the main office as provided in Section 18. Any waiver of the requirements of section 18 was beyond the scope of his authority as secretary and could not bind the association.

The finding of the master and the Chancellor that the insured was of sound mind at the time the attempted change of beneficiary was made, is amply supported by the evidence.

We are of the opinion there was not a valid change of beneficiary in behalf of the appellant. The judgment of the Circuit Court of Knox County is hereby affirmed.

Affirmed.

the secretary of local division No. 214, waived the requirements of section 12, and that the association is bound by such alleged waiver by limitation.

Under the by-laws of the association Kimpton's duties were to keep a list of the members and inform the main office of the association of the members in good standing belonging to his division. He was also to receive all assessments and certificate fees paid by members of his division and remit them to the home office. He had nothing to do with the changing of beneficiaries named in the certificates of the association, except to forward the request for a change of beneficiary and the old certificate to the main office as provided in section 12. Any waiver of the requirements of section 12 was beyond the scope of his authority as secretary and could not bind the association.

The finding of the master and the Chancellor that the insured was of sound mind at the time the attempted change of beneficiary was made, is amply supported by the evidence.

We are of the opinion there was not a valid change of beneficiary in behalf of the appellant. The judgment of the Circuit Court of Knox County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 628 4

BE IT REMEMBERED, that afterwards, to-wit: On OCT 24 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GENERAL NUMBER 8522 AGENDA NUMBER 19

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1932

LAFAYETTE C. LUTTRELL, as Administrator of the Estate of Dorothy Marie Luttrell, deceased, Appellant,	APPEAL FROM CIRCUIT COURT, LEE COUNTY.
vs.	
THE CHICAGO BURLINGTON AND QUINCY RAILROAD COMPANY, a corporation, Appellee.	

HUFFMAN-J.

This case was instituted in the circuit court of Lee county by appellant, as administrator of the estate of Dorothy Marie Luttrell, deceased. The evidence shows that about 7:30 A.M., on July 19, 1930, that Sirene B. Luttrell, mother of the deceased, and wife of appellant herein, was driving a Ford automobile westward upon the public highway toward her home. Plaintiff's intestate was riding in the automobile at the time. The automobile was struck by one of Appellee company's passenger trains, upon a public crossing about 1 mile north of the city of Lee, thereby killing plaintiff's intestate. Appellant brought suit under the statute on behalf of the next of kin. At the close of appellant's evidence, motion by appellee for an instructed verdict was granted and the jury was instructed to find the appellee company not guilty, and such verdict was thereupon returned by said jury.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1952

LAFAYETTE C. LUTTRELL, as Administrator of the Estate of Dorothy Marie Luttrell, deceased, Appellant,	
vs.	AFTER APPEAL FROM CIRCUIT COURT, LEE COUNTY.
THE CHICAGO BURLINGTON AND QUINCY RAILROAD COMPANY, a corporation, Appellee.	

MURPHY-J.

This case was instituted in the circuit court of Lee county by appellant, as administrator of the estate of Dorothy Marie Luttrell, deceased. The evidence shows that about 7:30 A.M., on July 19, 1950, that Sirene H. Luttrell, mother of the deceased, and wife of appellant herein, was driving a Ford automobile westward upon the public highway toward her home. Plaintiff's intestate was riding in the automobile at the time. The automobile was struck by one of Appellee company's passenger trains, upon a public crossing about 1 mile north of the city of Lee, thereby killing plaintiff's intestate. Appellant brought suit under the statute on behalf of the next of kin. At the close of appellant's evidence, motion by appellee for an instructed verdict was granted and the jury was instructed to find the appellee company not guilty, and such verdict was thereupon returned by said jury.

It is contended by appellant that the court erred in directing the verdict in favor of appellee company. The declaration contains six counts. The first charged appellee company with carelessness and improper management of its train. The second charged that the crossing was so obstructed as to cut off the view; that it was extra hazardous and that the appellee company was operating its train at the crossing at an excessive speed and without sufficient signals. The third charged a failure to ring a bell or sound a whistle continuously for a distance of 80 rods from the crossing to the place of such crossing. The fourth charged that appellee company knew the crossing to be extra hazardous and that it wilfully drove its locomotive and train across same at an excessive rate of speed and without proper signals. The fifth charged that appellee wilfully failed to cause a bell to be rung or a whistle to be sounded continuously for a distance of 80 rods from said crossing to the place of such crossing. The sixth count charged appellee company with wilfully and habitually operating its locomotives and trains across said crossing without sounding a whistle or ringing a bell continuously for a distance of 80 rods from the place of said crossing.

The only question involved in this case is whether the evidence of appellant raised sufficient questions of fact to cause the case to be submitted to the jury.

The evidence discloses that plaintiff's intestate was a child five years of age; that she had ridden with her mother on that morning to the city of Lee and was returning home from that city at the time of the accident. The car in which plaintiff's intestate was riding was approaching the crossing in question from the east. On the north side of the highway along which the automobile was traveling, was a row of willows and shrubs, which obstructed the view of

It is contended by appellant that the court erred in directing the verdict in favor of appellee company. The declaration contains six counts. The first charges appellee company with carelessness and improper management of its train. The second charged that the crossing was so obstructed as to cut off the view; that it was extra hazardous and that the appellee company was operating its train at the crossing at an excessive speed and without sufficient signals. The third charged a failure to ring a bell or sound a whistle continuously for a distance of 80 rods from the crossing to the place of such crossing. The fourth charged that appellee company knew the crossing to be extra hazardous and that it wilfully drove its locomotive and train across same at an excessive rate of speed and without proper signals. The fifth charged that appellee wilfully failed to cause a bell to be rung or a whistle to be sounded continuously for a distance of 80 rods from said crossing to the place of such crossing. The sixth count charged appellee company with wilfully and habitually operating its locomotives and trains across said crossing without sounding a whistle or ringing a bell continuously for a distance of 80 rods from the place of said crossing.

The only question involved in this case is whether the evidence of appellant raised sufficient questions of fact to cause the case to be submitted to the jury. The evidence discloses that plaintiff's intestate was a child five years of age; that she had been visiting with her mother on that morning to the city of Lee and was returning home from that city at the time of the accident. The car in which plaintiff's intestate was riding was approaching the crossing in question from the east. On the north side of the highway along which the automobile was travelling, was a row of willows and shrubs, which obstructed the view of

the driver of the car toward the north, which was the direction that appellee's train was approaching from. The speedometer on the car was not registering. The mother, on cross examination, stated that she did not think she was running the car over 8 to 10 miles an hour at the time of approaching the crossing in question. She further stated that she did not see any train approaching from the north, which was to her right; that she listened for a whistle or a bell, and that she heard none; that just as she entered the crossing, she saw the train coming from behind the willows; that she had been listening for signals such as a whistle or a bell as a warning before going upon the crossing, but had neard none.

The evidence was that the whistling post for this crossing is 1331 ½ feet north of the crossing. The following witnesses testified substantially as follows, for the appellant. Lafayette Luttrell stated that he was in the field at the time of the accident; that he heard the prolonged danger whistle at the crossing, but heard no whistle or bell prior to that time, except when he heard the train whistle for a station called Steward, which was to the north. George Arnold stated that he was working in the field about 10 rods from the whistling post north of this crossing. He stated that the whistle was not sounded and the bell was not rung until the sharp sound of the whistle at the crossing. He could see the crossing from where he was standing, and he proceeded to the scene of the accident, following the whistling that he heard given at the crossing. George Rodge stated that he was working in the field about 90 rods from the crossing; that he heard no whistle and heard no bell prior to the long danger whistle given at the crossing; that he could see the crossing from where he was standing. He proceeded to the scene of the accident and stated that it was at this place where he heard the first whistle. Frank

the driver of the car toward the north, which was the direction that appellant's train was approaching from. The speedometer on the car was not registering. The mother, on cross examination, stated that she did not think she was running the car over 8 to 10 miles an hour at the time of approaching the crossing in question. She further stated that she did not see any train approaching from the north, which was to her right; that she listened for a whistle or a bell, and that she heard none; that just as she entered the crossing, she saw the train coming from behind the willows; that she had been listening for signals such as a whistle or a bell as a warning before going upon the crossing, but had heard none.

The evidence was that the whistling post for this crossing is 1881 ½ feet north of the crossing. The following witnesses testified substantially as follows, for the appellant. Lafayette Luttrell stated that he was in the field at the time of the accident; that he heard the prolonged danger whistle at the crossing, but heard no whistle or bell prior to that time, except when he heard the train whistle for a station called Stewart, which was to the north. George Arnold stated that he was working in the field about 10 rods from the whistling post north of this crossing. He stated that the whistle was not sounded and the bell was not rung until the sharp sound of the whistle at the crossing. He could see the crossing from where he was standing, and he proceeded to the scene of the accident, following the whistling that he heard given at the crossing. George Rodgers stated that he was working in the field about 90 rods from the crossing; that he heard no whistle and heard no bell prior to the long danger whistle given at the crossing; that he could see the crossing from where he was standing. He proceeded to the scene of the accident and stated that it was at this place where he heard the first whistle. Frank

O'Donnell stated that he was about 90 rods from the crossing; that he heard no whistle or bell until he heard a loud blowing of the whistle at the crossing; he could see a black object on the front of the engine. He immediately went to the crossing where he saw the automobile and the bodies of Mrs. Luttrell, her daughter and her son. He stated that he can distinguish the difference between a common whistle such as is ordinarily sounded, and " a loud screechy whistle," such as he says was given at this time. When he reached the crossing the train was about 500 feet south of said crossing and still continued to whistle. Harry O'Donnell stated that he had his attention attracted by the unusual "shrill and screechy whistle." He does not remember of hearing any whistle or bell before that time. He immediately went out to see what had happened and stated that the train was beyond the crossing and was either stopped, or nearly stopped. He could see something on the front of the train. Thomas Oleson stated that he was working in the field about 50 rods from the crossing. He knows where the whistling post is located. He watched the train go by that morning. He does not remember any whistle or any bell being sounded near the whistling post north of this crossing. He says that he heard a whistle when the train got over by the crossing, and that this was the first whistle he remembers hearing. He stated that it was a long whistle, and that the train was south of the crossing. Homer E. Edwards stated that he was standing near the railroad track, south of the depot, at Lee; that he saw the train coming about 1 mile away; and that the next thing that he heard was a loud whistle and upon looking, saw something rolling in front of the engine. He states that he heard no whistle or bell prior to that time. Jeffry Eden stated that he was

O'Donnell stated that he was about 20 rods from the crossing; that he heard no whistle or bell until he heard a loud blowing of the whistle at the crossing; he said he saw a black object on the front of the engine. He immediately went to the crossing where he saw the automobile and the bodies of Mrs. Luttrell, her daughter and her son. He stated that he can distinguish the difference between a common whistle such as is ordinarily sounded, and " a loud screechy whistle," such as he says was given at this time. When he reached the crossing the train was about 300 feet north of said crossing and still continued to whistle.

Harry O'Donnell stated that he had his attention attracted by the unusual "shrill and screechy whistle." He does not remember of hearing any whistle or bell before that time. He immediately went out to see what had happened and stated that the train was beyond the crossing and was either stopped, or nearly stopped. He could see something on the front of the train. Thomas Olsson stated that he was working in the field about 20 rods from the crossing. He knows where the whistling post is located. He watched the train go by that morning. He does not remember any whistle or any bell being sounded near the whistling post north of this crossing. He says that he heard a whistle when the train got over by the crossing, and that this was the first whistle he remembers hearing. He stated that it was a long whistle, and that the train was south of the crossing. Homer K. Hawvrda stated that he was standing near the railroad track, north of the depot, at Lee; that he saw the train coming about 1 mile away; and that the next thing that he heard was a loud whistle and upon looking, saw something rolling in front of the engine. He states that he heard no whistle or bell prior to that time. Jerry Mann stated that he was

about 95 or 100 rods from the crossing. That he heard the long whistle and looked out and saw the train hit a car. He states that he heard no whistle or bell before that time. He went to the scene of the accident and viewed same, where he saw the three people lying on the west side of the embankment.

Appellant produced the above witnesses who were in the vicinity of the crossing in question at the time of the accident. None of these heard any whistle blown or any bell rung prior to the sudden blast of the whistle at the place of the accident. In view of this evidence and of the provisions of sec. 59, ch. 114 (Smith-Hurd Rev. Stat. 1929,) to the effect that a bell shall be rung or a whistle sounded by the engineer or firemen of a train, from at least 80 rods from any public crossing, and that the bell shall be kept ringing or the whistle kept blowing, until such crossing is reached; we are of the opinion that there was a sufficient question of fact raised by the testimony in this case to have required a submission of same to the jury. The testimony of appellant's witnesses regarding the failure of appellee company to give the signals as provided by statute, raised a question of fact, which was within the province of the jury.

Where there is a motion to direct a verdict for the defendant in an action for negligence, the evidence most favorable to the plaintiff must be taken as true and all that the evidence tends to prove and all just inferences to be drawn from it must be conceded, and if it fairly tends to support the allegations of the declaration, the case should be submitted to the jury. Molloy v. Chicago Rapid Transit Company 335 Ill. 164; Kaldunski v. Chicago City Ry. Co. 250 Ill. App. 475; Knotts v. Lake Shore etc. Ry. Co. 172 Ill. App. 550.

about 25 or 100 rods from the crossing. That he heard the long whistle and looked out and saw the train hit a car. He states that he heard no whistle or bell before that time. He went to the scene of the accident and viewed same, where he saw the three people lying on the west side of the embankment.

Appellant produced the above witnesses who were in the vicinity of the crossing in question at the time of the accident. None of these heard any whistle blown or any bell rung prior to the sudden blast of the whistle at the place of the accident. In view of this evidence and of the preceding ruling, 39, ch. 114 (Smith-Hurd Ann. Stat. 1920,) to the effect that a bell shall be rung or a whistle sounded by the engineer or fireman of a train, from at least 80 rods from any public crossing, and that the bell shall be kept ringing or the whistle kept blowing, until such crossing is reached; in view of the opinion that there was a sufficient question of fact raised by the testimony in this case to have required a submission of same to the jury. The testimony of appellant's witnesses regarding the failure of appellee company to give the signals as provided by statute, raised a question of fact, which was within the province of the jury.

Where there is a motion to direct a verdict for the defendant in an action for negligence, the evidence most favorable to the plaintiff must be taken as true and all that the evidence tends to prove and all just inferences to be drawn from it must be conceded, and if it fairly tends to support the allegations of the declaration, the case should be submitted to the jury. Malloy v. Chicago Rapid Transit Company 335 Ill. 164; Maldunski v. Chicago City Ry. Co. 250 Ill. App. 475; Mootts v. Lake Shore etc. Ry. Co. 172 Ill. App. 330.

The court erred in granting the motion of appellee company for an instructed verdict. Under the state of the evidence, a question of fact was raised as to whether appellee complied with the provisions of the statute in regard to the giving of the required signal before reaching the crossing. The cause is reversed and remanded.

Reversed and remanded.

The court erred in granting the motion of appellee company for an instructed verdict. Under the state of the evidence, a question of fact was raised as to whether appellee complied with the provisions of the statute in regard to the giving of the required signal before reaching the crossing. The cause is reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8 526

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GENERAL NO. 8526 AGENDA NO. 22

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1932.

BELT LINE BRICK COMPANY, A CORPORATION, Appellee vs. THE FLEXOTILE FLOOR CO., A CORPORATION, CHARLES R. LANE, AND CLARENCE E. FORT, Appellants	APPEAL FROM CIRCUIT COURT, WINNEBAGO COUNTY.

HUFFMAN-J.

Appellee corporation, the Belt Line Brick Company, and appellants, the Flexotile Floor Company and C. R. Lane, were jointly interested in a contract with the Wolff & Marx Company of San Antonio, Texas, for the laying of Flexotile Floors in two of its buildings. One of such buildings being located in San Antonio, and one located in Houston, and called the "Harris-Hahlo job." Appellant Lane was manager of the Flexotile Floor Company. Prior to the installation of the floors, he resigned as such manager, but retained his other connections with said company. Later a controversy arose between the parties concerning the installation of the floors, and in settlement of such controversy, the parties entered into the following written agreement:

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1952.

BELT LINE BRICK COMPANY, A CORPORATION, Appellee, vs. THE FLEXOTILE FLOOR CO., A CORPORATION, CHARLES R. LANE, AND CLARENCE E. YUNT, Appellants	APPEAL FROM CIRCUIT COURT, [illegible] COUNTY.

HUFFMAN-J.

Appellee corporation, the Belt Line Brick Company, and appellants, the Flexotile Floor Company and C. R. Lane, were jointly interested in a contract with the Wolff & Marx Company of San Antonio, Texas, for the laying of Flexotile floors in two of its buildings. One of such buildings being located in San Antonio, and one located in Houston, and called the "Harris-Hanlo job." Appellant Lane was manager of the Flexotile Floor Company. Prior to the installation of the floors, he resigned as such manager, but retained his other connections with said company. Later a controversy arose between the parties concerning the installation of the floors, and in settlement of such controversy, the parties entered into the following written agreement:

"This Memorandum of Agreement, made and entered into this 31st day of January, 1930, between Flexotile Floor Co., a Corporation of Rockford, Illinois, of the First Part, and the Belt Line Brick Co., a Corporation of Minneapolis, Minnesota, of the Second Part, and the Chicago Flexotile Floor Co., a Corporation, Party of the Third Part, and C. R. Lane party of the Fourth Part:-

WITNESSETH: that WHEREAS, heretofore, on or about the 20th day of December, 1929, a certain contract for installing a Flexotile Floor was entered into between the Chicago Flexotile Floor Co., and Wolff & Marx, of San Antonio, Texas, and on or about the same date a certain contract was entered into between Chicago Flexotile Floor Co. and the Harris-Hahlo Co., of Houston, Texas, for the installation of a Flexotile Floor for said Harris-Hahlo Co., and WHEREAS the said contracts have in fact been transferred to the said Flexotile Floor Co., of Rockford, Illinois, and the said assignment is questioned and disputed by the said Chicago Flexotile Floor Co., and a dispute has arisen as to the payment for the installation under said contracts.

Now, in consideration of the mutual covenants herein contained, it is agreed by and between the parties to this Agreement that the said C. R. Lane shall continue the installation of said floors and complete them in accordance with said contracts, and that when the said contracts respectively are completed, that all moneys due and to be paid thereon, shall be paid to the Flexotile Floor Company, of Rockford, Ill., in trust, however, for the following purposes:

"This Memorandum of Agreement, made and entered into this 31st day of January, 1930, between Flexotile Floor Co., a Corporation of Rockford, Illinois, of the First Part, and the Malt Line Brick Co., a Corporation of Minneapolis, Minnesota, of the Second Part, and the Chicago Flexotile Floor Co., a Corporation, Party of the Third Part, and G. H. Lane party of the Fourth Part:-

WITNESSETH: That WHEREAS, heretofore, on or about the 20th day of December, 1929, a certain contract for installing a Flexotile Floor was entered into between the Chicago Flexotile Floor Co., and Wolff & Metz, of San Antonio, Texas, and on or about the same date a certain contract was entered into between Chicago Flexotile Floor Co. and the Harris-Mehlo Co., of Houston, Texas, for the installation of a Flexotile Floor for said Harris-Mehlo Co., and WHEREAS the said contracts have in fact been transferred to the said Flexotile Floor Co., of Rockford, Illinois, and the said assignment is unchallenged and disputed by the said Chicago Flexotile Floor Co., and a dispute has arisen as to the payment for the installation under said contracts.

Now, in consideration of the mutual covenants herein contained, it is agreed by and between the parties to this Agreement that the said G. H. Lane shall continue the installation of said Floors and complete them in accordance with said contracts, and that when the said contracts respectively are completed, they will accept the work to be done thereon, and shall be paid to the Flexotile Floor Company, of Rockford, Ill., in trust, however, for the following purposes:

(1) The expenses for material, work and labor for installing said floors shall first be paid, and the net proceeds of said installation shall at once be divided equally by the said Flexotile Floor Co., of Rockford, Ill., between the said Belt Line Brick Company and the said C. R. Lane, and to each an undivided one-half interest thereof. It is understood that the payments to said Lane shall be in full for all services performed by him in connection with said contracts or either of them.

In testimony whereof each of the parties hereof have hereunto set their hands and seals this 31st day of January, 1930, in quadruplicate.

(Signed) Flexotile Floor Co.
C. E. Fair, Pres.

(Signed) Belt Line Brick Co.
By E.S. Gaylord, its attorney.

(Signed) Chicago Flexotile Floor Co.
By E.S. Gaylord, its attorney.

(Signed) C. R. Lane."

The work was completed and there came into the hands of the Flexotile Floor Company, of Rockford, Ill., pursuant to such work and under the above agreement, the sum of $9,018.42. From this amount the undisputed sum of $5,876.94 was paid out on account of material, work, and labor for the installation of said floors. A balance of $3,141.48 remained in the hands of the said Flexotile Floor Company, for the benefit of appellee and C. R. Lane, appellant.

(1) The expenses for material, work and labor for installing said floors shall first be paid, and the net proceeds of said installation shall at once be divided equally by the said Flexotile Floor Co., of Rochford, Ill., between the said Belt Line Brick Company and the said G. R. Lane, and to each of said[illegible] interest thereof.

It is understood that the payments to said Lane shall be in full for all services performed by him in connection with said contracts or either of them.

In testimony whereof each of the parties hereof have hereunto set their hands and seals this 21st day of January, 1922, in quadruplicate.

(Signed) Flexotile Floor Co.
G. R. Lane, Pres.

(Signed) Belt Line Brick Co.
By R.E. Dwyer, its attorney.

(Signed) Flexotile Floor Co.
By L.E. Dwyer, its attorney.

(Signed) G. R. Lane.

The work was completed and there came into the hands of the Flexotile Floor Company, of Rochford, Ill., pursuant to said work and under the above agreement, the sum of $9,012.42. From this amount the undisputed sum of $8,572.94 was paid out on account of material, work and labor for the installation of said floors. A balance of $1,141.48 remained in the hands of the said Flexotile Floor Company, for the benefit of appellee and G. R. Lane, appellant.

The Flexotile Floor Company was unable to make a division of the profits derived from said work between appellee and the said C. R. Lane, on account of the fact that Lane contended that there were additional items expended for material, work and labor other than those already allowed, and he requested the Flexotile Floor Company to retain this money until an agreement could be reached as to such additional expenses claimed by him.

Following this, the appellee filed its bill in chancery in the circuit court of Winnebago County, asking that the balance in the hands of the Flexotile Floor Company be distributed in accordance with the terms of the contract. The Flexotile Floor Company and Clarence E. Fort, its president, and said C. R. Lane, its Vice-President, designated as Charles R. Lane, were made parties defendant to the bill. The cause was referred to the master, who upon a hearing of the claim of the said C. R. Lane for additional expenses for material, work and labor, allowed an additional credit of $115.02, and thereupon found that there was a net balance in the hands of the Flexotile Floor Company of $3026.46, which should be divided equally between appellee and the said C.R. Lane, each thereby to receive the sum of $1513.23. Appellant Lane, filed his objections to the master's report, which objections were overruled by the master and ordered to stand as exceptions to the report before the circuit court. Upon a hearing on the exceptions before the court, to the report and findings of the master, the court allowed appellant Lane, an additional credit of $163.81, as proper charges for costs of installation and the report by the master was otherwise approved. Appellant Lane, prosecutes this appeal from the judgment of the court as rendered.

The appellant Lane, claimed certain additional expenses in the way of overhead expenses for office rent and

The Flexotile Floor Company was unable to make a division of the security derived from such sums between appellee and the said G. R. Lane, on account of the fact that Lane contended that there were additional items expended for material, work and labor other than those already allowed, and he requested the Flexotile Floor Company to retain this money until an agreement could be reached as to such additional expenses claimed by him.

Following this, the appellee filed his bill in chancery in the circuit court of Winnebago County, asking that the balance in the hands of the Flexotile Floor Company be distributed in accordance with the terms of the contract. The Flexotile Floor Company and Charles E. Hoyt, its president, and said G. R. Lane, its vice-president, defendants in the bill, G. R. Lane, were made parties defendant to the bill. The cause was referred to the master, who upon a hearing of the claim of the said G. R. Lane for additional expenses for material, work and labor, allowed an additional credit of $114.02, and thereupon found that there was a net balance in the hands of the Flexotile Floor Company of $3026.46, which should be divided equally between appellee and the said G.R. Lane, each thereby to receive the sum of $1513.23. Appellant Lane, filed his objections to the master's report, which objections were overruled by the master and ordered to stand as exceptions to the report before the circuit court. Upon a hearing on the exceptions before the court, to the report and finding of the master, the court allowed appellant Lane, an additional credit of $105.81, as proper charges for costs of installation and the report by the master was otherwise approved. Appellant Lane, prosecutes this appeal from the judgment of the court as rendered.

The appellant Lane, claimed certain additional expenses in the way of overhead expenses for office rent and

office salaries, and for depreciation on office furniture and equipment in an office maintained by him in Chicago, Illinois. He also claimed salary and expenses for an employee, which he designated as being for non-productive time. The evidence in this case was somewhat extended and was carefully considered by both the master and the trial court, at which times the parties appeared and were heard regarding the expense items in controversy.

It is urged by appellant Lane, that the office expenses claimed by him were legitimate charges, while appellee claims that such expenses were not included or contemplated in the above agreement. The only issue in this case is whether the overhead expenses of appellant as claimed, were contemplated and included under the terms of the written contract as entered into between the parties.

It was agreed by Lane that he would continue the installation of the floors and complete them in accordance with the contracts; and that all money due therefor was to be paid to the Flexotile Floor Company of Rockford, Illinois, in trust for Lane and appellee herein, after the payment of expenses for material, work and labor for the installing of said floors. It was further agreed by Lane that he was to receive one-half of the profits remaining after the payment of the expenses for material, work and labor in installing the floors, in full for all services performed by him in connection with the contracts or either of them.

Where disputes and controversies exist between parties, and they undertake to settle same by their written agreement, all matters of dispute, negotiations, agreements and oral discussions in relation to the subject matter, and prior to the execution of the written instrument, are merged in the written instrument; and the same supersedes all of their prior negotiations and agreements upon the subject in

office salaries, and for depreciation on office furniture and equipment in an office maintained by him in Chicago, Illinois. He also claimed salary and expenses for an employee, which he designated as being for non-productive time. The evidence in this case was somewhat intricate and was apparently considered by both the master and the trial court, at which times the parties appeared and were heard regarding the expense items in controversy.

It is urged by appellant Lane, that the office expenses claimed by him were legitimate charges, while appellee claims that such expenses were not included or contemplated in the above agreement. The only issue in this case is whether the overhead expenses of appellant as claimed, were contemplated and included under the terms of the written contract as entered into between the parties.

It was agreed by Lane that he would continue the installation of the floors and complete them in accordance with the contracts; and that all money due thereafter was to be paid to the Flexotile Floor Company of Rockford, Illinois, in trust for Lane and appellee herein, after the payment of expenses for material, work and labor for the installing of said floors. It was further agreed by Lane that he was to receive one-half of the profits remaining after the payment of the expenses for material, work and labor in installing the floors, in full for all services performed by him in connection with the contracts or either of them.

Where disputes and controversies exist between parties, and they undertake to settle same by their written agreement, all matters of dispute, negotiations, agreements and oral discussions in relation to the subject matter, and prior to the execution of the written instrument, are merged in the written instrument; and the same encompasses all of their prior negotiations and agreements upon the subject in

controversy. Harmony Cafeteria Co. v. International Supply Co. 249 Ill. App. 532; American Natl. Bk. v. Holsen 331 Ill. 622.

Appellant Lane, states that he is vice-president of the Flexotile Floor Company of Rockford, Illinois, and that he was also vice-president and general manager of the Chicago Flexotile Floor Co; that he had charge of the installation of the Flexotile Floors in the two buildings in question herein; that both the Wolff & Marx Company and Harris-Hahlo Company are owned by the same company, which operates under two names. Appellant Lane undertakes to apportion or pro rate certain overhead expenses of his Chicago office with reference to the work done in Texas, which included claims for depreciation on office furniture and on office equipment, office rent, and miscellaneous items. Said appellant states that during the time of the installation of the floors, that he maintained an office in Chicago, Ill., and at no other place, and that the salaries and expenses claimed were part of the expenses of operating that office. The fact that he maintained an office in Chicago, was a matter of his own choosing and in no wise the result of the laying of these two floors in question. Companies and individuals who are engaged in contracting and construction work must expect to maintain some place of business and some form of organization. Neither of these elements can rightfully be considered as material, work and labor going into the actual execution of any certain contract. It is only reasonable that the company or individual engaged in such work shall expect to make a profit from the conduct of such business, and it is from these profits that overhead expenses should be expected to be maintained.

Authority. Harmony Industries Co. v. International Security Co. 249 Ill. App. 582; Western Mfg. Co. v. Nelson 221 Ill. 224.

Appellant does, state that he is the vice-president of the Flexotile Floor Company of Rockford, Illinois, and that he was also vice-president and general manager of the Chicago Flexotile Floor Co; that he had charge of the installation of the Flexotile floors in the two buildings in question herein; that both the Rockford and Harris-Hanis Company are owned by the same company, which operates under two names. Appellant has undertaken to apportion or pro rate certain overhead expenses of his Chicago office with reference to the work done in Texas, which included claims for depreciation on office furniture and on office equipment, office rent, and miscellaneous items. Said appellant states that during the time of the installation of the floors, that he maintained an office in Chicago, Ill., and at no other place, and that the salaries and expenses claimed were part of the expenses of operating that office. The fact that he maintained an office in Chicago, was a matter of his own choosing and in no wise the result of the laying of these two floors in question. Corporation and individuals who are engaged in contracting and construction work must expect to maintain some place of business and some form of organization. Neither of these elements can rightfully be considered as material, work and labor going into the actual execution of any certain contract. It is only reasonable that the company or individual engaged in such work should expect to make a profit from the conduct of such business, and it is from these profits that overhead expenses should be expected to be maintained.

We are of the opinion that the words, "the expenses for material, work and labor for installing the floors ***," do not include such overhead expenses as claimed by appellant Lane. If the parties had intended to include a share of the expenses of Lane for the maintenance and operation of his Chicago office and the carrying on of his business there in general, they should have so stated in their contract. In the absence of the use of any words in the agreement entered into between the parties in this case, providing for the inclusion of such overhead expenses of Lane in the maintenance of his office, such words can not now be supplied, and the parties must accept the agreement in the terms written. By no reasonable interpretation can we say that the agreement includes or contemplated such charges as are now urged by Lane. Finding no error, the decree of the trial court is affirmed.

Affirmed.

We are of the opinion that the words, "the expenses for material, work and labor for installing the floors ***," do not include such overhead expenses as claimed by appellant here. If the parties had intended to include a share of the expenses of labor for the maintenance and operation of his Chicago office and the carrying on of his business there in general, they should have so stated in their contract. In the absence of the use of any words in the agreement showing that between the parties in this case, providing for the limitation of such overhead expenses of labor in the maintenance of his office, such words can not now be supplied, and the parties must answer the agreement in the terms written. By no reasonable interpretation can we say that the expenses included or contemplated such charges as are now claimed by Lane. Finding no error, the decree of the Trial Court is affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 24 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GENERAL NO.8535 AGENDA NO. 25

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1932

ERNEST BECKMAN, Appellee	)	
vs.	)	APPEAL FROM COUNTY COURT, WINNEBAGO COUNTY.
J. A. ROOSE and FRANK PETERSON, Doing business as SUPERIOR TRANSIT CO., Appellants.	)	

HUFFMAN-J.

This suit was originally commenced by appellee in justice of the peace court, and appealed to the county court of Winnebago county. Appellee sued appellants for damages to his automobile received while the same was being operated by one Arthur Stegall. The jury returned a verdict in favor of appellee in the sum of $142.50. Appellants prosecute this appeal from that judgment. The evidence discloses that the said Stegall was operating appellee's automobile north on Kishwaukee street, in the city of Rockford, Illinois, at about the hour of 11:45 P.M., on the night of May 26, 1931.

Stegall was employed at the Palace theatre. As he was proceeding north on said street at the time in question and between Third avenue and Fourth avenue, appellants were engaged in backing a furniture truck out into the street from a garage located on the east side of Kishwaukee street, some-

GENERAL NO. 3288 AGENDA NO. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1952

ERNEST BRONELLA, Appellee	
vs.	APPEAL FROM COUNTY COURT, WINNEBAGO COUNTY.
J. A. ROSEN and FRANK PETERSON, Doing business as SUPERIOR TRANSIT CO., Appellants.	

GUTTMAN-J.

This suit was originally commenced by appellee in justice of the peace court, and appealed to the county court of Winnebago county. Appellee sued appellants for damages to his automobile received while the same was being operated by one Arthur Stegall. The jury returned a verdict in favor of appellee in the sum of $142.50. Appellants prosecute this appeal from that judgment. The evidence discloses that the said Stegall was operating appellee's automobile north on Kishwaukee street, in the city of Rockford, Illinois, at about the hour of 11:45 P.M., on the night of May 26, 1951.

Stegall was employed at the Palace theatre. As he was proceeding north on said street at the time in question and between Third avenue and Mount avenue, appellants were engaged in backing a furniture truck out into the street from a garage located on the east side of Kishwaukee street, some-

where within the block, between Third and Fourth avenues. The furniture truck was about 30 feet in length. The evidence on behalf of appellee tended to show that the furniture truck was being backed out of a private driveway of said garage, on to the street; that no tail light was showing on the said truck; and that the garage from which the truck was being backed out of was not lighted. The driver of appellee's car claims that he did not see the truck in time to avoid striking it, and that as soon as he did see it, he swerved appellee's car to the left to avoid a collision and that the rear of the truck collided with the right side of appellee's car, causing the damage sued for.

Kishwaukee street runs north and south, and appellee's car was being driven north upon said street and along the east side thereof. Appellant's truck was being backed in to the street from a garage building located on the east side of said street, and as the truck was backed out upon Kishwaukee street, it was directly in the path of appellee's car. Whether the accident was the result of appellant's negligence, was a question of fact for the jury. Appellants' claim that their truck had stopped at the time of the collision, but the driver of appellee's car denies this and states that the truck was still moving backwards into the street until the time of the collision, and that he swerved appellee's car to the left as much as possible to avoid the collision. The street in question is about 36 feet in width and has a street car track down the middle. The driver of appellee's car claims that the rear of appellants' truck was extending beyond the center of the street at the time of the collision, and extended 3 or 4 feet beyond the car track. Appellants claim that there were street lights on the street, but appellee urges that the nearest street light was 100 feet or more south of appellants' truck. The

were within the block, between Third and Fourth avenues. The furniture truck was about 30 feet in length. The evidence on behalf of appellee tended to show that the furniture truck was being backed out of a private driveway of said garage, on to the street; that no tail light was showing on the said truck; and that the garage from which the truck was being backed out of was not lighted. The driver of appellee's car claims that he did not see the truck in time to avoid striking it, and that as soon as he did see it, he swerved appellee's car to the left to avoid a collision and that the rear of the truck collided with the right side of appellee's car, causing the damage sued for.

Kiawanee street runs north and south, and appellee's car was being driven north upon said street and along the east side thereof. Appellant's truck was being backed in to the street from a garage building located on the east side of said street, and as the truck was backed out upon Kiawanee street, it was directly in the path of appellee's car. Whether the accident was the result of appellant's negligence, was a question of fact for the jury. Appellants' claim that their truck had stopped at the time of the collision, but the driver of appellee's car denies this and states that the truck was still moving backwards into the street until the time of the collision, and that he swerved appellee's car to the left as much as possible to avoid the collision. The street in question is about 56 feet in width and has a street car track down the middle. The driver of appellee's car claims that the rear of appellants' truck was extending beyond the center of the street at the time of the collision, and extended 3 or 4 feet beyond the car track. Appellants claim that there were street lights on the street, but appellee urges that the nearest street light was 100 feet or more south of appellants' truck. The

evidence shows that the end board of the truck was down at the time of the collission and that it concealed the tail light of the truck. A police officer who came upon the scene of the accident, testified that there were tire marks along the street car tracks at the place of the accident; that the furniture truck was loaded; and that the end board was down.

The testimony of appellee and appellants was sharply in conflict and was properly a matter for the jury to pass upon. Shearer v. Aurora, etc. Ry. Co. 200 Ill. App. 225; Blackhurst v. James 304 Ill. 586. Where the evidence is hopelessly in conflict, the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence, and the verdict of the jury should remain undisturbed, unless it appear that it was the result of passion or prejudice, or contrary to the clear weight of the evidence. Dick v. Zimmerman 105 Ill. App. 615; Humphreys v. East St. L. & S. Ry. Co. 253 Ill. App. 450; Leeper v. Gay 253 Ill. App. 176 (183). Appellants object to appellee's given instructions 2, 3 and 4, but upon the reading of the same, together with the other given instructions in the case, no harmful error appears in these instructions, and upon the whole, we are of the opinion that the jury was properly instructed. The size of the verdict in this case would not indicate any prejudice or improper motives on the part of the jury in reaching its verdict. The jury had an opportunity to see and hear the witnesses and it was in their province to pass upon the credibility of such witnesses. Finding no reversible error, the judgment of the county court is affirmed.

Affirmed.

evidence shows that the end board of the truck was down at the time of the collision and that it concealed the tail light of the truck. A police officer who came upon the scene of the accident, testified that there were skid marks behind the street car tracks at the place of the accident; that the furniture truck was loaded; and that the end board was down.

The testimony of appellee and appellants was sharply in conflict and was properly a matter for the jury to pass upon. Shearer v. Aurora, etc. Ry. Co. 200 Ill. App. 222; Blackhurst v. James 204 Ill. 322. Where the evidence is hopelessly in conflict, the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence, and the verdict of the jury should remain undisturbed, unless it appear that it was the result of passion or prejudice, or contrary to the clear weight of the evidence. Dick v. Zimmerman 102 Ill. App. 615; Humphreys v. West St. L. & S. Ry. Co. 213 Ill. App. 400; Leeper v. Ry. 234 Ill. App. 174 (1924).

Appellants object to appellee's given instructions 2, 3 and 4, but upon the reading of the case, whether they the other given instructions in the case, no harmful error appears in these instructions, and upon the whole, we are of the opinion that the jury was properly instructed. The size of the verdict in this case would not indicate any prejudice or improper motives on the part of the jury in reaching its verdict. The jury had an opportunity to see and hear the witnesses and it was in their province to pass upon the credibility of such witnesses. Finding no reversible error, the judgment of the county court is affirmed.

Affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8700

133 A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On NOV 22 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8700 Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1933.

H. G. Beardsworth, et al.,

Appellees,

vs.

Whiteside and Rock Island Special Drainage District of the Counties of Whiteside and Rock Island, and State of Illinois, et al.,

Appellants.

Appeal from the Circuit Court of Whiteside County.

WOLFE - P.J.

We have examined the pleadings and decree in this case, No. 8700, and from the relief asked and granted, we have decided that this Court has no jurisdiction of the appeal, for the reason that the appeal relates to revenue and falls within section 18 of the Practice Act. This conclusion is based on the following aspects of the case:

The Bill prays (page 16 of the Abstract)that assessments made by the commissioners of the district for repairs and interest made in 1923, 24 - 25 - 26 - 27, and 1928, and also another assessment made on January 2, 1926, and an assessment for care of gates made November 19, 1928, be held void.

It is held that assessments made for repairs are void because (1) there were no repairs made; (2) the money realized from the assessments was used to pay attorney's fees, engineer's fees, and commissioner's fees; (3) the assessments were made with the intent to use the money for other purposes than repairs (to pay attorney, engineers and commissioners, and these were directly paid from said assessments, or the money was paid into the general fund, diverted,

Sup. Ct. 6700 Agenda No. 3.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1928.

F. G. Bartlewerth, et al.,

Appellees,

vs.

Appeal from the Circuit Court of Whiteside County.

Whiteside and Rock Island Special Drainage District of the Counties of Whiteside and Rock Island, and State of Illinois, et al.,

Appellants.

MOLTZ - P.J.

We have examined the pleadings and decree in this case, No. 6700, and from the relief asked and granted, we have decided that this Court has no jurisdiction of the appeal, for the reason that the appeal relates to revenue and falls within section 11 of the Practice Act. This conclusion is based on the following aspects of the case:

The Bill prays (page 16 of the Abstract) that assessments made by the commissioners of the district for repairs and interest made in 1923, 24 - 25 - 26 - 27, and 1928, and also another assessment made on January 2, 1926, and an assessment for cess of gates made December 12, 1928, be held void.

It is held that assessments made for repairs are void because (1) there were no repairs made; (2) the money realized from the assessments was used to pay attorney's fees, engineer's fees, and commissioner's fees; (3) the assessments were made with the intent to use the money for other purposes than repairs (to pay attorney, engineers and commissioners, and these were directly paid from said assessments, or the money was paid into the general fund, diverted,

and then paid to such gentlemen).

It is claimed the assessments for interest are void because the alleged interest was to pay interest on vouchers for work and improvements in the district for which the complainants were not liable nor their land, because their land was not benefited by the improvement and work as held by the Supreme Court.

As to the assessment made January 2, 1926. This was made to pay attorney's fees, engineer's fees, commissioner's fees, after the work for which fees were due was done, and it is claimed an assessment under the law then existing, could not be made for work done, or debts already incurred.

The assessment of November 19, 1928, for $500.00, for care of gates, it is claimed could not be assessed against lands of complainants because the gates are a part of the improvement which the Supreme Court held did not benefit complainant's lands.

Further, as it appears from a supplemental bill (see page 27 of Abstract) the commissioners made another assessment after the original bill was filed. This assessment is to take care of attorney's fees, engineer's fees, commissioner's fees, court costs in suits pending in the Circuit Court and County Courts, and the case at bar is presumably one of them. This assessment, it is claimed, was made to harass the complainants.

All of the assessments are claimed to be void because they are claimed to be based on a classification that was made for the improvement which the Supreme Court has held did not benefit the lands of the complainants. Also, the assessments are void because made without notice to the complainants.

There are outstanding unpaid vouchers of the district to pay such fees. The bill asks that the payment of these vouchers be enjoined.

The decree finds that all of these assessments are void (except one for $2000.00 for a deficiency, and which was not levied on lands

and then paid to such gentlemen).

It is claimed the assessments for interest are void because the alleged interest was to pay interest on vouchers for work and improvements in the district for which the complainants were not liable nor their land, because their land was not benefited by the improvement and work as held by the Supreme Court.

As to the assessment made January 5, 1922. This was made to pay attorney's fees, engineer's fees, commissioner's fees, after the work for which fees were due was done, and it is claimed an assessment under the law then existing, could not be made for work done, or debts already incurred.

The assessment of October 13, 1922, for $500.00. For case of gates, it is claimed that no assessment against lands of complainants because the gates are a part of the improvement which the Supreme Court held did not benefit complainant's lands.

Further, as it appears from a supplemental bill (see page 27 of Abstract) the commissioners made another assessment after the original bill was filed. This assessment is to take care of attorney's fees, engineer's fees, commissioner's fees, court costs in suits pending in the Circuit Court and County Courts, and the case at bar is presumably one of them. This assessment, it is claimed, was made to harass the complainants.

All of the assessments are claimed to be void because they are claimed to be based on a classification that was made for the improvement which the Supreme Court has held did not benefit the lands of the complainants. Also, the assessments are void because made without notice to the complainants.

There are outstanding unpaid vouchers of the district to pay such fees. The bill asks that the payment of these vouchers be enjoined.

The decree finds that all of these assessments are void (except one for $3000.00 for a deficiency, and which was not levied on lands

of complainants); enjoins the collection of the assessments, and enjoins the collection of the vouchers. It is true, the decree is broader than the prayer of the bill, nevertheless, the validity of the vouchers rests upon the validity of the assessments. The purpose and assence of the suit is to enjoin the collection of the vouchers because the assessments from which the vouchers are paid are void. The vouchers are not to be paid because the assessment from which they are to be paid are void.

The question of revenue is directly involved. Can the district collect the amounts of the assessments to pay the vouchers? The Court is not asked to declare the vouchers void, but to hold that they may not be paid because the assessments are void. The right of the district to collect revenue is involved. (~~vide~~, People v. Com'rs of Drainage Dis't., vs. Schwartz, 244 Ill. App. 137).

If the assessments are good, the vouchers should be paid. If the assessments are good they can be collected; if not, then they can not be collected -- If that is not revenue, then what is?

Section 118 of the Practice Act relating to the revenue, applies to drainage districts -- Knight v. Partridge D.D., 259 Ill. 63.

Suit to enjoin collection of special tax relates to revenue. Mushbaugh v. Village of East Peoria, 260 Ill. 27; and cases cited.

For the reasons above stated the Clerk of this Court is hereby directed to transfer said case, together with all the files therein, to the Supreme Court of the State of Illinois.

All Judges concur.

or complainants); enjoining the collection of the assessments, and enjoining the validation of the vouchers. It is true, the decree is broader than the prayer of the bill, nevertheless, the validity of the vouchers rests upon the validity of the assessments. The purpose and essence of the suit is to enjoin the collection of the vouchers because the assessments from which the vouchers are paid are void. The vouchers are not to be paid because the assessment from which they are to be paid are void.

The question of revenue is directly involved. Can the district collect the amounts of the assessments to pay the vouchers? The court is not asked to declare the vouchers void, but to hold that they may not be paid because the assessments are void. The right of the district to collect revenue is involved. (~~Hale~~, People v. Chair of Drainage Dist., va. Schwartz, 244 Ill. App. 187).

If the assessments are good, the vouchers should be paid. If the assessments are good they can be collected; if not, then they can not be collected — it does is not revenue that will if

Section 118 of the Practice Act relating to the revenue, applies to drainage districts — Knight v. Fourteenth D.D., 280 Ill. 22.

Suit to enjoin collection of special tax relates to revenue. Kreisberg v. Village of East Peoria, 280 Ill. 27; and cases cited.

For the reasons above stated the clerk of this Court is hereby directed to transfer said case, together with all the files therein, to the Supreme Court of the State of Illinois.

All judges concur.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

8670

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8670 Agenda No. 32

In the Appellate Court of Illinois

Second District

May Term, A. D. 1933

Edna Brandt,

Appellee,

vs.

Harvey Franklin,

Appellant;

Appeal from the City Court of Aurora.

DOVE, J.

This was an action brought by appellee to recover damages for personal injuries received by her when the car in which she was riding and which was driven by appellant along Route No. 22, between Aurora and Plainfield, some five miles from Aurora, struck the up-right rampart of a concrete culvert and overturned. From a judgment in her favor for $3500.00, the defendant below brings the record to this court for review.

About eight o'clock on the evening of July 29, 1931, appellant and Claude Jeffers drove to the home of appellee on State Street in Aurora in appellant's Pontiac coach, and appellee, then nineteen years of age, accepted an invitation to go for a drive, and got in the rear seat with Jeffers. Appellant was alone in the front seat and drove. They went towards Naperville and stopped at Tileyard Park, where they had a couple of glasses of beer, and then returned to Aurora. It was a little after nine o'clock when they arrived in Aurora upon their return from Tileyard Park, and from that time until ten fifteen or ten thirty o'clock they drove around the city of Aurora, and then started toward Plainfield, the accident occurring about fifteen minutes after they left Aurora the second time.

During all the time they were in the car the parties occupied the same positions, appellant driving and appellee and Jeffers were

Gen. No. 8870 Agenda No. 32

In the Appellate Court of Illinois

Second District

May Term, A. D. 1932

Elmer Drexel,

Appellee,

vs.

Harvey Franklin,

Appellant;

Appeal from the City Court of Aurora.

DOYLE, J.

This was an action brought by appellee to recover damages for personal injuries received by her when the car in which she was riding and which was driven by appellant along Route No. 28, between Aurora and Plainfield, some five miles from Aurora, struck the up-right support of a concrete culvert and overturned. From a judgment in her favor for $3800.00, the defendant below brings the record to this court for review.

About eight o'clock on the evening of July 29, 1931, appellant and Claude Jeffers drove to the home of appellee on State Street in Aurora in appellant's Pontiac coach, and appellee, then nineteen years of age, accepted an invitation to go for a drive, and got in the rear seat with Jeffers. Appellant was alone in the front seat and drove. They went towards Naperville and stopped at Tilleyard Park, where they had a couple of glasses of beer, and then returned to Aurora. It was a little after nine o'clock when they arrived in Aurora upon their return from Tilleyard Park, and from that time until ten fifteen or ten thirty o'clock they drove around the city of Aurora, and then started toward Plainfield, the accident occurring about fifteen minutes after they left Aurora the second time.

During all the time they were in the car the parties occupied the same positions, appellant driving and appellee and Jeffers were

in the rear seat. After leaving Aurora on their way to Plainfield, appellant passed a Ford automobile going in the same direction, and after proceeding a short distance approached a Buick car also going in the same direction. The Ford car which appellant had recently overtaken then passed appellant's car and proceeded in its proper traffic lane in front of appellant's car and behind the Buick. Not long thereafter, appellant turned his car in the other traffic lane in order to pass both the Ford car and the Buick and was driving between thirty-five and forty-five miles per hour. There were no cars approaching from the opposite direction, and as appellant's car approached the rear of the Ford, the driver of the Ford car, without warning, cut over in front of him and onto the left traffic lane, forcing appellant off the pavement, and his car collided with the concrete culvert, throwing appellee from the car, and as a result thereof, she sustained serious injuries. There was a radio in the car and according to the testimony of Jeffers, appellee was asleep for a portion of the trip from Tileyard Park to Aurora and during most of the time they were driving in Aurora, but awakened about the time they were leaving Aurora for Plainfield, talked a little, and went back to sleep and was asleep at the time of the accident.

Appellee testified that at the time she left her home she asked appellant and Jeffers to bring her home early, and they stated they would and that when they left Tileyard Park she told them to take her home and they said they would. In this she was corroborated by Jeffers. She further testified that all she remembers about the return trip to Aurora was that they arrived in Aurora and drove along Broadway, but does not know when they started toward Plainfield, as she was asleep. She further testified that appellant was driving carefully at all times when she was awake and that she had no occasion to complain of his driving or the manner in which he handled the car.

Appellant testified in his own behalf that for more than

in the rear seat. After leaving Agnora on their way to Plainfield, appellant passed a Ford automobile going in the same direction, and after proceeding a short distance approached a Buick car also going in the same direction. The Ford car which appellant had recently overtaken then passed appellant's car and proceeded in its proper traffic lane in front of appellant's car and behind the Buick. Not long thereafter, appellant turned his car in the other traffic lane in order to pass both the Ford car and the Buick and was driving between thirty-five and forty-five miles per hour. Thus was he when approaching from the opposite direction, and as appellant's car approached the rear of the Ford, the driver of the Ford car, without warning, cut over in front of him and onto the left traffic lane, forcing appellant off the pavement, and his car collided with the concrete culvert, throwing appellee from the car, and as a result thereof, she sustained serious injuries. There was a radio in the car and according to the testimony of Jeffers, appellee was asleep for a portion of the trip from Tilgner, Ivy to Agnora and during most of the time they were driving in Agnora, but remained awake the time they were leaving Agnora for Plainfield, talked a little, and went back to sleep and was asleep at the time of the accident.

Appellee testified that at the time she left her home she asked appellant and Jeffers to bring her home early, and they stated they would and that when they left Tilgnard Park she told them to take her home and they said they would. In this she was corroborated by Jeffers. The further testimony of the witness showed the return trip to Agnora was that they arrived in Agnora and drove along Broadway, but does not know when they started toward Plainfield, as she was asleep. She further testified that appellant was driving carefully at all times when she was awake and that she had no occasion to complain of his driving or the manner in which he handled the car.

Appellant testified in his own behalf that for more than

five years immediately prior to the time of the accident he was a truck driver in the employ of the Fox Valley Motor Service. That his car was in good mechanical condition and equipped with lights and brakes which were in good working order. He denied that appellee ever said in his presence that she desired to get home early, and testified that upon their return from Tileyard Park to Aurora, they all engaged in conversation and that appellee was awake when they passed State Street in Aurora, where she lived. That for more than an hour they drove around Aurora, and during that time appellee was laughing and talking, and before leaving Aurora he inquired whether they should go home and Jeffers said it was too early and suggested that they drive to Plainfield.

Upon this evidence appellee insists that appellant knew when he left Tileyard Park, about nine o'clock, that it was her desire to go home and that upon their arrival in Aurora it was his duty to take her home, and not having done so, her status as a guest ceased upon her arrival in Aurora from Tileyard Park; that she did not voluntarily accept appellant's hospitality of a ride toward Plainfield, and that at the time of the accident and for some time prior thereto, she was an involuntary passenger.

Sec. 43-b of Chapter 95a of the Motor Vehicle Act, Cahill Illinois Revised Statutes 1933 provides that no person riding in a motor vehicle as a guest, without payment for such ride, shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner for injury in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator and unless such wilful and wanton misconduct contributed to the injury for which the action is brought. In Crawford v. Foster, 110 Cal. App. 81; 2 93 Pac. 842, the court in defining the term "guest" as used in a somewhat similar Statute said, "We think the meaning of the language used is that a guest is one who is invited, either directly or

five years immediately prior to the time of the accident he was a truck driver in the employ of the Fox Valley Motor Service. That his car was in good mechanical condition and equipped with lights and brakes which were in good working order. He denied that appellee ever said in his presence that she desired to go home early, and testified that upon their return from Tilleyard Park to Aurora they all engaged in conversation and that appellee was awake when they passed State Street in Aurora, where she lived. That for more than an hour they drove around Aurora, and during that time appellee was laughing and talking, and before leaving Aurora he inquired whether they should go home and Jeffers said it was too early and suggested that they drive to Plainfield.

Upon this evidence appellee insists that appellant knew when he left Tilleyard Park, about nine o'clock, that it was her desire to go home and that upon their arrival in Aurora it was his duty to take her home, and not having done so, her status as a guest ceased upon her arrival in Aurora from Tilleyard Park; that she did not voluntarily accept appellant's hospitality at a late hour in Plainfield, and that at the time of the accident and for some time prior thereto, she was an involuntary passenger.

Sec. 42-b of Chapter 95a of the Motor Vehicle Act, Smith Illinois Revised Statutes 1933 provides that no person riding in a motor vehicle as a guest, without payment for such ride, shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner for injury in case of accident, unless such accident shall have been caused by the willful and wanton misconduct of the driver or operator and unless such willful and wanton misconduct contributed to the injury for which the action is brought. In Crawford v. Foster, 110 Ill. App. 31; 2 N.E. 2d 918, the court in defining the term "guest" as used in a somewhat similar Statute said, "We think the meaning of the language used is that a guest is one who is invited, either directly or

by implication, to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride, either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car other than the mere pleasure of his company".

Appellee voluntarily accepted the hospitality of appellant, who was driving his automobile. There was no understanding where they should go or how long they should be gone, or when they should return. She was accompanying appellant for a ride in his car for her own enjoyment, without making any return to appellant other than the pleasure of her company. She was there by invitation and was his guest within the meaning of the Statute. The fact that she was asleep at various times did not change her status, nor did she thereby cease to be his guest. She testified that she recalled being in Aurora and driving down Broadway through the business district of the city after her return from Tileyard Park. She knew the radio was turned on when they left the Park and recalls that it was not going while they drove in Aurora. No request or suggestion was ever made by appellee, after leaving Tileyard Park, that she be taken home. Her home was in Aurora. They drove in the city for at least more than one hour before they started for Plainfield. There is no evidence of any improper conduct upon the part of any of the occupants of the car, and none of them were intoxicated. No request or suggestion was made by appellee at any time which can be interpreted to mean that her original status of guest was ever changed to that of an involuntary passenger. Without protest she continued as appellant's guest until the accident happened. Under the evidence, no other conclusion could reasonably be arrived at.

Appellee being a guest at the time of the injury, appellant can not be held liable in this action unless the collision was

by implication, be only the hospitality of a driver of a car; who accepts such hospitality, and who takes a ride, either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car other than mere pleasure of his company".

Appellee voluntarily accepted the hospitality of appellant, who was driving his automobile. There was no understanding where they should go or how long they would be gone, or when they should return. She was accompanying appellant for a ride in his car for her own enjoyment, without making any return to appellant other than the pleasure of her company. She was there by invitation and was his guest within the meaning of the statute. The fact that she was asleep at various times did not change her status, nor did she thereby cease to be his guest. She testified that she recalled being in Agnora and driving down Broadway through the business district of the city after her return from Tilayand Park. She knew the radio was turned on when they left the Park and recalls that it was not going while they drove in Agnora. No request or suggestion was ever made by appellee, after leaving Tilayand Park, that she be taken home. Her home was in Agnora. They drove in the city for at least more than one hour before they started for Plainfield. There is no evidence of any improper conduct upon the part of any of the occupants of the car, and none of them were intoxicated. No request or suggestion was made by appellee at any time which can be interpreted to mean that her original status of guest was ever changed to that of an involuntary passenger. Without proofs she continued as appellant's guest until her injuries happened. Under the evidence, no other conclusion could reasonably be arrived at.

Appellee being a guest at the time of the injury, appellant can not be held liable in this action unless the collision was

caused by his wilful and wanton conduct. The undisputed testimony is that appellant was an experienced driver and travelling at not an unreasonable rate of speed just before he attempted to pass the Ford car. His car was in good mechanical condition, with adequate brakes and head lights. He followed the Ford car for three hundred or four hundred feet before he sought to pass it, and when he was three or four car lengths behind the Ford car, he increased his speed somewhat, sounded his horn, pulled to the left, and when his car arrived about even with the rear of the Ford car, he again sounded his horn, but at that instant the Ford car turned, without warning, to the left toward his car, and forced him from the pavement into the culvert.

The pavement was straight and it and the four foot dirt shoulders were dry, the night was clear, there was no traffic approaching from the opposite direction and appellant did not see the culvert or know of its existence.

The Connecticut Statute provides that no guest of the operator of an automobile shall have a cause of action for damages for injuries sustained in an accident unless such accident shall have been intentional upon the part of the operator or caused by his heedlessness or his reckless disregard of the rights of others. In Grasso v. Frattolillo, 111 Conn. 209, 149 Atl. 838, a finding was sustained that a driver's conduct was not such as to indicate a reckless disregard of the rights of others, where he was driving on a down grade behind two other cars and in an effort to pass them, pulled to the left, just as the driver of the car immediately in front tried to do likewise, and the left rear wheel of the defendant's car caught on the edge of the paved portion of the road, occasioning it to skid across the road, resulting in the collision complained of.

In Simpson v. Steinhoff - Cal. App. -, 21 Pac. (2nd) 960, a directed verdict for the defendant was upheld where the host,

caused by his willful and wanton conduct. The undisputed testimony in that appellant was an experienced driver and travelling at not an unreasonable rate of speed just before he attempted to pass the Ford car. The car was in good mechanical condition, with adequate brakes and head lights. He followed the Ford car for three hundred or four hundred feet before he sought to pass it, and when he was three or four car lengths behind the Ford car, he increased his speed somewhat, sounded his horn, pulled to the left, and when his car arrived about even with the rear of the Ford car, he again sounded his horn, but at that instant the Ford car turned, without warning, to the left toward his car, and forced him from the pavement into the ditch.

The pavement was straight and it had the four foot dirt shoulders were dry, the night was clear, there was no traffic approaching from the opposite direction and appellant did not see the contact or know of its existence.

The Connecticut Statute provides that no guest of the operator of an automobile shall have a cause of action for damages for injuries sustained in an accident unless such accident shall have been intentional upon the part of the operator or caused by his heedlessness or his reckless disregard of the rights of others. In Grano v. Prettofillo, 111 Conn. 209, 149 Atl. 838, a finding was sustained that a driver's conduct was not such as to indicate a reckless disregard of the rights of others, where he was driving on a down grade behind his other car and in an effort to pass them, pulled to the left, just as the driver of the car immediately in front tried to do likewise, and the left rear wheel of the defendant's car caught on the edge of the paved portion of the road, necessitating it to skid across the road, resulting in the collision complained of.

In Simpson v. Steinhoff - Cal. App. -, 21 Pac. (2nd) 980, a directed verdict for the defendant was upheld where the boat,

who was driving at a reasonable rate of speed, increased it in trying to pass another car, which thereupon suddenly turned to the left, without warning, forcing the host to swing still further to the left, causing the accident.

In our opinion, appellee, at the time of the accident, was a guest within the meaning of the provisions of our Statute, and that the proximate cause of the accident was not the wilful and wanton misconduct of appellant. The judgment of the trial court is therefore reversed, and the cause remanded.

Reversed and Remanded.

who was driving at a reasonable rate of speed, increased it in trying to pass another car, which therefore suddenly turned in the left, without warning, forcing the last to swing still farther to the left, causing the accident.

In our opinion, appellee, at the time of the accident, was a guest within the meaning of the provisions of our statute, and that the proximate cause of the accident was not the willful and wanton misconduct of appellant. The judgment of the trial court is therefore reversed, and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8691

135

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. FRANKLIN R. DOVE, Justice.
Hon. BLAINE HUFFMAN, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

272 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8691 Agenda No. 6.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1933.

Henry F. Lawrence,

Plaintiff in Error

vs.

Emma J. Glos,

Defendant in Error.

Error to Circuit Court,
DuPage County.

HUFFMAN-J.

This was an action in assumpsit brought by the plaintiff in error against defendant in error for a balance of broker's commission, claimed due upon the sale of real estate. The cause was heard by the court without a jury. The judgment of the trial court was that the plaintiff take nothing because of his action, and judgment was entered against plaintiff for costs, from which judgment he has prosecuted this writ of error.

Defendant in error was the owner of certain real estate located in Cook County, Illinois. On August 1, 1928, she entered into a written contract with H.O. Stone & Company, Inc., of Chicago, Illinois, wherein the said Stone & Company were granted the agency rights to plat and subdivide the land of the defendant in error, and to sell the lots contained in such subdivision. Stone & Company by the terms of the agreement was to fix and determine the sale price of the lots. It was provided therein that defendant in error should receive the total sum of $668,644.00, from the sale of such lots and that Stone & Company was to take for its profits, costs, expenses and compensation for services of every kind and character, and for all moneys advanced by it in connection with the enterprise, the selling price of said lots over and above that portion thereof that should go to constitute the aforesaid $668,644.00, that defendant in

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1923.

Henry F. Lawrence,

Plaintiff in Error

vs.

Error to Circuit Court,
Dupage County.

Zeno J. Olson,

Defendant in Error.

HUTCHISON-J.

This was an action in assumpsit brought by the plaintiff in error against defendant in error for a balance of broker's commissions, claimed due upon the sale of real estate. The cause was heard by the court without a jury. The judgment of the trial court was that the plaintiff take nothing because of his action, and judgment was entered against plaintiff for costs, from which judgment he has prosecuted this writ of error.

Defendant in error was the owner of certain real estate located in Cook County, Illinois. On August 1, 1922, she entered into a written contract with H.O. Stone & Company, Inc., of Chicago, Illinois, wherein the said Stone & Company were granted the agency rights to plat and subdivide the land of the defendant in error, and to sell the lots contained in such subdivision. Stone & Company by the terms of the agreement was to fix and determine the sale price of the lots. It was provided therein that defendant in error should receive the total sum of $888,644.00, from the sale of such lots and that Stone & Company was to take for its profits, costs, expenses and compensation for services of every kind and character, and for all moneys advanced by it in connection with the enterprise, the selling price of said lots over and above that portion thereof that should go to constitute the aforesaid $888,644.00, that defendant in

error was to receive. A schedule was made with said contract which was designated as schedule "A" and disclosed the proposed selling price, which totaled the sum of $1,500,000. It was provided that as the payments were made upon the lots by the purchasers thereof, that one-half of such payments should go to defendant in error and one-half be retained by Stone & Company until defendant in error should have received the total sum agreed to, as aforesaid. Pursuant to this agreement with Stone & Company the defendant in error conveyed the legal title to said premises to the Elmhurst State Bank, as trustee, to hold such title for the purpose of carrying out the agreement, and to take care of any contingency that might happen to defendant in error and in order that proper transfer of the title to such lots might be made to the purchaser thereof at such time as he should complete his payments thereon.

On the day following the above agreement, defendant in error wrote to plaintiff in error the following letter:

"Chicago, Illinois
August 2, 1928

Mr. Henry F. Lawrence,
839 Lake Street,
Oak Park, Illinois.

Dear Sir:

In connection with the sale of the farm placed under contract with H.O. Stone & Company dated August 1, 1928, which is located at North Avenue and Mannheim Road, Cook County, Illinois, I agree to pay you as commission for services rendered effecting the sale of said property, a total commission of five per cent on the sale price of $668,644.00 (or $33,432.00) to be paid to you if and when the purchase price is received by me at the rate of ten per cent of the payments received by me on account of the sales price.

Very truly yours,

Emma J. Gloe"

H.O. Stone & Company became bankrupt. The Chicago Title & Trust Company was appointed receiver, and as such, sold all the right, title and interest of Stone & Company in the sale contracts then outstanding under the agency agreement herein.

error was in payment. A schedule was made with said contract which was designated as schedule "A" and disclosed the proposed selling price, which totaled the sum of $1,000,000. It was provided that as the payments were made upon the lots by the purchasers thereof, that one-half of such payments should go to defendant in error and one-half be retained by Stone & Company until defendant in error should have received the total sum agreed to, as aforesaid. Pursuant to this agreement with Stone & Company the defendant in error conveyed the legal title to said premises to the Elmhurst State Bank, as trustee, to hold such title for the purpose of carrying out the agreement, and to take care of any contingency that might happen to defendant in error and in order that proper transfer of the title to such lots might be made to the purchaser thereof at such time as he should complete his payments thereon.

On the day following the above agreement, defendant in error wrote to plaintiff in error the following letter:

"Chicago, Illinois
August 2, 1924

Mr. Harry V. Lawrence,
520 Lake Street,
Oak Park, Illinois.

Dear Sir:

In connection with the sale of the farm placed under contract with J. S. Stone & Company dated March 1, 1924, which is located at North Avenue and Kenmore road, Oak Park, Illinois, I agree to pay you as commission for services rendered effecting the sale of said property, a total commission of five per cent on the sale price of $998,814.00 (or $49,940.70) to be paid to you if and when the purchase price is received by me at the rate of ten per cent of the payments received by me on account of the sales price.

Very truly yours,

(Signed) C. Clark"

J.S. Stone & Company became bankrupt. The Chicago Title & Trust Company was appointed receiver, and as such, sold all the right, title and interest of Stone & Company in the sale contracts then outstanding under the above agreement herein.

After default upon the contract by Stone & Company, the defendant in error terminated and cancelled same, as she had a right to do under the forfeiture clause therein. This cancellation became effective on or about November 14, 1930.

At this time defendant in error had received from Stone & Company, under the terms of the contract, the sum of $166,535.24. During the time defendant in error had received these payments of money from Stone & Company under the contract, she had paid to plaintiff in error from time to time, amounts which the evidence discloses, totaled $26,218.77. Plaintiff in error in this suit claims that defendant in error owes him a 5% commission upon the total amount that she was to receive from Stone & Company, under the above contract, and urges as his reason therefor, that when defendant in error exercised her right of forfeiture of the Stone & Company contract, and cancelled the same, she took the unsold portion of the premises then reverting to her because of the cancellation, in full settlement and satisfaction of the balance of the $668,644.00 that was expected to accrue to her, and that her taking the unsold portion of the premises back was equivalent to her receiving the unpaid portion of the aforesaid total sum, which she would have received had the venture terminated in the manner evidenced by the contract. Plaintiff in error in his declaration claimed that there was therefore, a total commission due him of $33,432.00, that he had been paid thereon the sum of $25,958.00, and that there was a balance due him of $7,475.00.

Plaintiff in error relies largely upon the case of Crane v. Eddy 191 Ill. 645. That case differs from the present case in its essential elements. In that case, Eddy sold premises belonging to Crane, for which his total commission was to be $854.24. Crane took notes and mortgage from the purchaser as part of the purchase price of the premises so sold. The purchaser defaulted therein and Crane brought his bill of foreclosure and proceeded to a final decree. At the sale of the premises by the Master, Crane,

after default upon the contract by Stone & Company, the defendant in error terminated and cancelled same, as she had a right to do under the forfeiture clause therein. This cancellation became effective on or about November 14, 1930.

At this time defendant in error had received from Stone & Company, under the terms of the contract, the sum of $166,355.24. During the time defendant in error had received these payments of money from Stone & Company under the contract, she had paid to plaintiff in error from time to time, amounts which the evidence discloses, totaled $26,218.77. Plaintiff in error in this suit alleges that defendant in error owes him a 5% commission upon the total amount that she was to receive from Stone & Company, under the above contract, and urges as his reason therefor, that when defendant in error exercised her right of forfeiture of the Stone & Company contract, and cancelled the same, she took the unsold portion of the premises then reverting to her because of the cancellation, in full settlement and satisfaction of the balance of the $600,644.00 that was expected to accrue to her, and that her taking the unsold portion of the premises back was equivalent to her receiving the unpaid portion of the aforesaid total sum, which she would have received had the venture terminated in the manner evidenced by the contract. Plaintiff in error in his declaration claims that there was therefore, a total commission due him of $18,425.00; that he had been paid thereon the sum of $25,988.00, and that there was a balance due him of $7,475.00.

Plaintiff in error relies largely upon the case of Crane v. Daly 101 Ill. 245. That case differs from the present case in its essential elements. In that case, Daly sold premises belonging to Crane, for which his total commission was to be $[illegible]. Crane took notes and mortgage from the purchaser as part of the purchase price of the premises so sold. The purchaser defaulted thereon and Crane brought his bill of foreclosure and proceeded to a final decree. At the sale of the premises by the Master, Crane,

in open competition, bid in the premises for the full amount remaining due upon the purchase price, and costs, and executed a release therein to the master in full satisfaction of the debt and interest due him. After this occurred, Eddy brought suit for the balance of his commission. It was held that Eddy was entitled to such commission, as Crane bid in the premises for the full amount of the purchase price remaining unpaid, together with costs, and the fact that no one raised the bid or that no one redeemed from the sale, did not change the fact that the purchase notes given upon the purchase debt were fully paid and satisfied by the sale to Crane. The court held that the debt for the purchase money had been paid and discharged in the manner provided by the contract, by public sale of the premises; and that since Crane at such sale, had bid in the premises for the full amount due, that he had thus accepted and purchased them for this amount, and that Eddy was entitled to his commission.

The contention of plaintiff in error herein that defendant in error by exercising her right of forfeiture of the contract with Stone & Company upon its default and insolvency, and the resulting condition that the unsold premises then reverted to defendant in error relieved from the contract with Stone & Company was a full receipt and realization by the plaintiff in error of the total sum that was to have been received by her upon a successful conclusion of the said contract, is without merit. The title never passed from defendant in error to Stone & Company. Had title to the premises been in Stone & Company, the receiver thereof would have liquidated the unsold portion of the premises, in the administration of the insolvent estate. In the Crane case, supra, Crane conveyed the legal title to the premises to the purchaser, Jernberg, and thereupon, Jernberg became the owner of the legal title to the premises, subject only to the mortgage lien.

In this case it appears from the letter of the defendant in error to the plaintiff in error, under date of August 2, 1928,

in open competition, bid in the premises for the full amount remaining due upon the purchase price, and costs, and executed a release thereof to the mortgagee in full satisfaction of the debt and interest due him. After this occurred, Mr. Hodgkins sold for the balance of his repletion. It was held that Mr. Mudd was entitled to such remission, as there bid in the premises for the full amount of the purchase price remaining unpaid, together with costs, and the fact that no one raised the bid or that no one redeemed from the sale, did not change the fact that the purchase notes given upon the purchase debt were fully paid and satisfied by the sale to Grove. The court held that the debt for the purchase money had been paid and discharged in the manner provided by the contract, by virtue of the sale of the premises; and that upon Grove's sale, and bid in the premises for the full amount due, that he had thus accepted and purchased them for this amount, and that Mudd was entitled to his commission.

The contention of plaintiff in error herein that defendant in error by exercising her right of forfeiture of the contract with Stone & Company upon its default and insolvency, and the resulting condition that the unsold premises then reverted to defendant in error relieved from the contract with Stone & Company was a full receipt and realization by the plaintiff in error of the total sum that was to have been received by her upon a successful consummation of the said contract, is without merit. The title never passed from defendant in error to Stone & Company. Had title to the premises been in Stone & Company, the receiver would have litigated the unsold portion of the premises, in the administration of the insolvent estate. In the Grove case, supra, Grove conveyed the legal title to the premises to the purchaser, Lambert, and thereupon, Lambert became the owner of the legal title to the premises, subject only to the mortgage lien.

In this case it appears from the letter of the defendant in error to the plaintiff in error, under date of August 2, 1922,

that the plaintiff in error was to receive as his pay and commission for services rendered in connection with the contract between defendant in error and Stone & Company, a 5% commission, limited in all events to the aggregate amount that defendant in error was to receive upon the final consummation of the Stone & Company contract. This total amount that could have come to defendant in error was $668,644.00, as aforesaid, and the greatest amount of commission that plaintiff in error could possibly receive thereunder, would be $33,432.00. It will be observed by the terms of the letter that the commission is "To be paid to you if and when the purchase price is received by me at the rate of 10% of the payments received by me on account of the sales price."

Parties to a written instrument are bound by the terms thereof and when the same are fairly clear and unequivocal, strained constructions thereof are not warranted to make such contracts speak in different terms than reasonably appear therein. The language and intent of the letter from defendant in error to plaintiff in error is reasonably clear, and it is manifestly apparent that plaintiff in error's commission was to be based upon the money received by defendant in error from Stone & Company under her contract with them, and that she was to remit to plaintiff in error payments on his total commission of $33,432.00 at the rate of 10% of such payments received by her from Stone & Company. The evidence discloses that defendant in error did this. It can not fairly be said that defendant in error in her letter to plaintiff in error, agreed or promised to pay plaintiff in error any fixed or certain amount, or that defendant in error did therein unconditionally promise to pay any sum of money to plaintiff in error; but her agreement was to pay to plaintiff in error 10% of all remittances received from Stone & Company, under the contract with her, until plaintiff in error should have received a total sum of 5% upon $668,644.00, being $33,432.00. Her letter expressly

that the plaintiff in error was to receive as his pay and commission for services rendered in connection with the contract between defendant in error and Stone & Company, a 5% commission, limited in all events to the aggregate amount that defendant in error was to receive upon the final consummation of the Stone & Company contract. This total amount that could have come to defendant in error was $660,644.00, as aforesaid, and the greatest amount of commission that plaintiff in error could possibly receive thereunder, would be $33,432.00. It will be observed by the terms of the letter that the commission is "to be paid to you if and when the purchase price is received by me at the rate of 10% of the payments received by me on account of the sales price."

Parties to a written instrument are bound by the terms thereof and when the same are fairly clear and unqualified, criminal transactions thereof are not warranted to make such contracts speak in different terms than reasonably appear therein. The language and intent of the letter from defendant in error to plaintiff in error is reasonably clear, and it is manifestly argued that plaintiff in error's commission was to be based upon the money received by defendant in error from Stone & Company under her contract with them, and that she was to remit to plaintiff in error payments on his total commission of $33,432.00 at the rate of 10% of such payments received by her from Stone & Company. The evidence discloses that defendant in error did this. It can not fairly be said that defendant in error in her letter to plaintiff in error, agreed or promised to pay plaintiff in error any fixed or certain amount, or that defendant in error did therein unconditionally promise to pay any sum of money to plaintiff in error; but her agreement was to pay to plaintiff in error 10% of all remittances received from Stone & Company, under the contract with her, until plaintiff in error should have received a total sum of 5% upon $660,644.00, being $33,432.00. Her letter expressly

stated that plaintiff in error's commission was to be paid to him "if and when" the payments were received fro Stone & Company, and at the rate of 10% of such payments until he received his aforesaid total of 5%.

It is apparent that plaintiff in error's maximum commission was dependent upon and contingent upon the final consummation of the contract with Stone & Company. As above stated, no unconditional promise is therein contained to pay plaintiff in error any fixed or certain sum of money, but only the agreement to pay him certain amounts, if and when, the sums out of which such amounts were to be paid were received from Stone & Company. Her promise to pay is conditional, and conditioned upon first receiving the principal sums from Stone & Company out of which plaintiff in error was to receive his commission.

We do not consider that the election of defendant in error to exercise her right of forfeiture of the contract with Stone & Company, upon its bankruptcy, was equivalent to a full satisfaction of the remaining unpaid purchase price that defendant in error was to receive in event of the entire consummation of the contract. The reversion of the unsold property to defendant in error was incidental to the default of Stone & Company, and was some thing over which defendant in error could exercise no choice or control. Under such circumstances, the unsold property that was involved in the contract with Stone & Company naturally reverted to defendant in error. She was the true owner of the property at all times, and her conveyance to the Elmhurst State Bank as trustee, was merely in order to provide for any contingency that might happen to her, and to insure that legal title might be made to purchasers to the lots at such future time as they might complete the final payments thereon. We do not deem the above to amount to a receipt by defendant in error of the sum of $502,108.76. which was the difference remaining between what defendant in error did realize under her contract with Stone &

stated that plaintiff in error's assistance was to be paid to him "if and when" the properties were vested from Stone & Company, and at the rate of 10% of such payments until he received his aforesaid total of $6.

It is apparent that plaintiff in error's services rendered were dependent upon and contingent upon the final adjudication of the contract with Stone & Company. As above stated, no unconditional promise is therein contained to pay plaintiff in error any fixed or ascertain sum of money, but only the agreement to pay him certain amounts, if and when, the sums out of which such amounts were to be paid were received from Stone & Company. Our promise is by its conditional, and conditioned upon first receiving the principal sums from Stone & Company out of which plaintiff in error was to receive his commission.

We do not consider that the election of defendant in error to exercise her right of forfeiture of the contract with Stone & Company, upon its bankruptcy, was equivalent to a full satisfaction of the remaining unpaid purchase price that defendant in error was to receive in event of the entire consummation of the contract. The reversion of the unsold property to defendant in error was incidental to the default of Stone & Company, and was a thing over which defendant in error could exercise no choice or control. Under such circumstances, the unsold property that was involved in the contract with Stone & Company naturally reverted to defendant in error. She was the true owner of the property at all times, and her conveyance to the Hibernia State Bank as trustee, was merely in order to provide for any contingency that might happen to her, and to insure that legal title might be made to purchasers in the lots at such future time as they might complete the final payments thereon. We do not deem the above to amount to a receipt by defendant in error of the sum of $202,102.78, which was the difference remaining between what defendant in error did realize under her contract with Stone &

Company and what she would have realized in the event of the actual consummation thereof. Ash v. Oppman 199 Ill. App. 573; Matteson v. Walker 249 Ill. App. 404; Nudelman v. Wildes 160 Ill. App. 134.

The payment of commission to be received by plaintiff in error was based upon the Stone & Company contract, and based upon the receipt of such moneys thereunder as was actually paid by Stone & Company to defendant in error, pursuant to such agreement. The evidence discloses that the defendant in error complied with her agreement to pay plaintiff in error in the manner as set out in her letter. There was not sufficient money received by defendant in error from Stone & Company to entitled plaintiff in error to receive his maximum commission. It appears that defendant in error had slightly overpaid plaintiff in error with respect to the money due him from her receipts from Stone & Company under the terms of her agreement with plaintiff in error. It appears from the evidence that defendant in error owes plaintiff in error nothing because of his action against her. The judgment of the trial court was correct, and is affirmed.

Judgment affirmed.

company and what she would have realized in the event of the actual commercial transfer. Ind v. Chgo Ins Ill. App. 277; Matheson v. Walker 246 Ill. App. 404; Mandelman v. Wilson 160 Ill. App. 184.

The payment of commission to be received by plaintiff in error was based upon the Stone & Company contract, and based upon the receipt of such moneys thereunder as was actually paid by Stone & Company to defendant in error, pursuant to such agreement. The evidence discloses that the defendant in error complied with her agreement to pay plaintiff in error in the manner as set out in her letter. There was not sufficient money received by defendant in error from Stone & Company to entitled plaintiff in error to receive his maximum commission. It appears that defendant in error had slightly overpaid plaintiff in error with respect to the money due him from her receipts from Stone & Company under the terms of her agreement with plaintiff in error. It appears from the evidence that defendant in error owes plaintiff in error nothing because of his action against her. The judgment of the trial court was correct, and is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8698 Agenda No. 9

In the Appellate Court of Illinois

Second District

October Term, A.D. 1933

The City of Waukegan,

appellee,

vs.

Edith T. Higley, et al,

(George W. Cummings,

appellant),

Interlocutory
Appeal from Circuit Court,
Lake County

HUFFMAN-J.

This appeal is prosecuted by appellant herein from an order of the circuit court of Lake county, denying the motion of appellant to dissolve a temporary injunction that had issued at the instance of appellee.

On July 5, 1928, at a meeting of the city council of the city of Waukegan, the following resolution was presented:

> "Whereas, it is desirable and necessary for the City of Waukegan to have an administration building for the transaction of its business, now, therefore
>
> Be it resolved by the council of the city of Waukegan:
>
> Section 1. That the said City shall purchase from Edith T. Higley, Frances L. Higley and Violet E. Johnstone, for the purpose of a city hall, the following described real estate situated in the City of Waukegan, Lake County, Illinois, to-wit:
>
> The East Two hundred (200) feet of the following described real estate, to-wit: Lots five (5), six (6), seven (7) and eight (8) in Block nine (9) Original Town of Little Fort (now city of Waukegan) for $100,000.
>
> Section 2. That the said City shall pay in cash upon delivery to it of a warranty deed to the above described premises, the sum of Twenty Thousand Eight Hundred Dollars ($20,800.00) and assume and agree to pay a trust deed encumbrance now upon said property amounting to Seventy Nine Thousand Two Hundred Dollars ($79,200.00), Said trust deed indebtedness being evidenced by promissory notes payable on or before fifteen (15)

General No. [illegible] Agenda No. 9

In the Appellate Court of Illinois

Second District

October Term, A.D. 1952

The city of Waukegan,

appellee,

vs.

Edith T. Higley, et al,

(George W. Cummings,

appellants).

Interlocutory
Appeal from Circuit Court,
Lake County

HUFFMAN-J.

This appeal is prosecuted by appellant herein from an order of the circuit court of Lake county, denying the motion of appellant to dissolve a temporary injunction that had issued at the instance of appellee.

On July 8, 1952, at a meeting of the city council of the city of Waukegan, the following resolution was presented:

"Whereas, it is desirable and necessary for the City of Waukegan to have an administration building for the transaction of its business, now, therefore

Be it resolved by the council of the city of Waukegan:

Section 1. That the said City shall purchase from Edith T. Higley, Frances L. Higley and Violet K. Johnstone, for the purpose of a city hall, the following described real estate situated in the City of Waukegan, Lake County, Illinois, to-wit:

The East Two hundred (200) feet of the following described real estate, to-wit: Lots five (5), six (6), seven (7) and eight (8) in Block nine (9) Original Town of Little Fort (now city of Waukegan) for $100,000.

Section 2. That the said City shall pay in cash upon delivery to it of a warranty deed to the above described premises, the sum of Twenty Thousand Eight Hundred Dollars ($20,800.00) and assume and agree to pay a trust deed encumbrance now upon said property amounting to Seventy Nine Thousand Two Hundred Dollars ($79,200.00), said trust deed indebtedness being evidenced by promissory notes payable on or before Fifteen (15)

years from their date with interest at five and three quarters per cent ($5\frac{3}{4}\%$) per annum.

Section 3. That the Mayor and City Clerk be and they are hereby authorized and directed to execute a warrant on the proper fund for the payment of the above mentioned sum of Twenty Thousand Eight Hundred Dollars ($20,800.00) and that the warranty deed, subject to the above mentioned encumbrance, be accepted."

The resolution after being presented and read on the above date was placed on file and came before the said council at its meeting on July 13, 1928, at which meeting the resolution was formally adopted by the said city council. The city at that time was under the commission form of government, having a mayor and four city commissioners. A yea and nay vote was taken and recorded at the meeting of July 13, 1928. The mayor and three city commissioners were present. No vote was cast against the resolution, and all present voted in favor thereof. Pursuant to the terms of the above resolution, a deed of conveyance was made and delivered to the city of Waukegan for the said premises. Under the terms of the resolution, the city paid $20,800 of the purchase price in cash upon delivery of the deed for the premises, subject to a trust deed securing notes aggregating $79,200, which the city assumed and agreed to pay. Subsequently the city went into possession of the premises and spent approximately $20,000 in the remodeling of the buildings thereon, in order to render the same suitable for the purposes purchased. The city remained in possession and occupancy of the premises and the buildings thereon for more than three years, using the same for the purposes for which the premises were purchased. During such time the city did not retire any of the indebtedness evidenced by the notes, totalling $79,200.

On or about August 31, 1932, suit was instituted upon said notes in the circuit court of Lake county, against the city. The city brought its bill of complaint to restrain appellant herein and others, from further proceeding in the above action upon the

years from their date with interest at five and three quarters per cent (5¾%) per annum.

Section 3. That the water and gas plant be and they are hereby authorized and directed to execute a warrant or the proper lien for the payment of the above mentioned sum of Twenty Thousand Eight Hundred Dollars ($20,800.00) and that the warranty deed, subject to the above mentioned encumbrance, be accepted.*

The resolution after being presented and read on the above date was placed on file and came before the said council at its meeting on July 13, 1922, at which meeting the resolution was formally adopted by the said city council. The city at that time was under the commission form of government, having a mayor and four city commissioners. A per cent day vote was taken and recorded at the meeting of July 13, 1922. The mayor and three city commissioners were present. No vote was cast against the resolution, and all present voted in favor thereof. Pursuant to the terms of the above resolution, a deed of conveyance was made and delivered to the city of Muskegon for the said premises. Under the terms of the resolution, the city paid $20,800 of the purchase price in cash upon delivery of the deed for the premises, subject to a trust deed securing notes aggregating $72,500, which the city assumed and agreed to pay. Subsequently the city went into possession of the premises and spent approximately $20,000 in the remodeling of the buildings thereon, in order to render the same suitable for the purposes purchased. The city remained in possession and occupancy of the premises and the buildings thereon for more than three years, using the same for the purposes for which the premises were purchased. During such time the city did not retire any of the indebtedness evidenced by the notes, totalling $72,500.

On or about August 21, 1923, suit was instituted upon said notes in the circuit court of Lake county, against the city. The city brought its bill of complaint to restrain appellant herein and others, from further proceeding in the above action upon the

notes and trust deed. Temporary restraining order issued in said cause against the defendants in that bill of complaint. Appellant moved to dissolve the temporary injunction because of the insufficiency of the bill of complaint, which motion was denied. Appellant prosecutes this appeal from the judgment of the court in denying the motion to dissolve the said injunction.

Appellee in its bill for injunction in this case recites that the said city was under a commission form of government consisting of a mayor and four commissioners; that the resolution to purchase the above property for city hall purposes was duly passed by the city council at a meeting on July 13, 1928, with the mayor and three commissioners present; that no votes were cast against the adoption of the resolution, and all present at such meeting voted in favor of the same; that pursuant thereto warranty deed was issued and delivered for the premises, to the city, and that the sum of $20,800 in cash was paid upon the purchase price of the premises, according to the terms of the resolution, and that the city did assume and agree to pay $79,200 as provided by the trust deed. The bill further states that the city went into possession of the premises and remodeled the same, spending $18,845.33 in such work; and claims that the building no longer meets the needs of said city and is undesirable for the uses and purposes for which the same was purchased and remodeled.

It further appears by the bill that the form of city administration has been changed from the commission form, and that the city government is now conducted by a mayor and alderman; and that this bill was brought to restrain the collection of the balance of the purchase price of the said property purchased by the city from the Wigleys and others, as aforesaid. The principal relief sought in the bill is the rescission of the purchase contract for the above property, and a cancellation of the notes and obligation thereunder assumed, and the bill prays that the act

nores and trust deed. Temporary restraining order issued in said cause against the defendants in that bill of complaint. Appellant moved to dissolve the temporary injunction because of the insufficiency of the bill of complaint, which motion was denied. Appellant prosecutes this appeal from the judgment of the court in denying the motion to dissolve the said injunction.

Appellee in its bill for injunction in this case recites that the said city was under a municipal form of government consisting of a mayor and four commissioners; that the resolution to purchase the above property for city hall purposes was duly passed by the city council at a meeting on July 14, 1928, with the mayor and three commissioners present; that no votes were cast against the adoption of the resolution, and all present at such meeting voted in favor of the same; that pursuant thereto warranty deed was issued and delivered for the premises, to the city, and that the sum of $30,800 in cash was paid upon the purchase price of the premises, according to the terms of the resolution, and that the city did assume and agree to pay $75,200 as provided by the trust deed. The bill further states that the city went into possession of the premises and remodeled the same, spending $[illegible] in such work; and claims that the building no longer meets the needs of said city and is undesirable for the uses and purposes for which the same was purchased and remodeled.

It further appears by the bill that the form of city administration has been changed from the commission form, and that the city government is now conducted by a mayor and aldermen; and that this bill was brought to restrain the activities of the balance of the purchase price of the said property purchased by the city from the Migleys and others, as aforesaid. The principal relief sought in the bill is the rescission of the purchase contract for the above property, and a cancellation of the notes and obligation thereunder assumed, and the bill prays that the set

of purchase thereof and notes issued therefor and all obligations thereunder arising on the part of the city may be cancelled and rescinded and held for naught, and that the appellant who is the holder of said notes, his attorneys and agents, his assignees, and all persons claiming through or under him may be permanently enjoined and restrained from taking any steps to collect thereunder or taking any steps to attempt the collection of the principal and interest thereon.

Such action is in conflict with the holding of the Supreme Court of Illinois in the case of Stripe v. Yager, 348 Ill. 362, which was a direct proceeding in chancery brought for the purpose of enjoining the furtherance and the carrying out of the provisions as contained in the above resolution of the city council of Waukegan, passed under date of July 13, 1928, for the purchase of these premises. It was held in that case that the city of Waukegan had a lawful right to purchase the premises for the purposes indicated, and in the manner in which they were purchased. The above case not only determined the right of the city to make such purchase, but fixed its liability therefor.

The bill herein seeks to inject fraud into the transaction of the purchase of the property. The allegations of the bill in this respect are all directed toward the owners of the property and the mayor of the city at the time of such purchase, and the allegations of collusion as between these parties are based purely upon information and belief. This purchase was made by act of the common council of the city of Waukegan and there is no charge in the bill of fraud upon the part of that governing body. It has been held that the acts of the members of a city council who vote for any measure can not be impeached by an inquiry into the motives of the members of such council who vote for such measure. It is a well known rule of law that the knowledge and good faith of a legislature are not open

of purchase thereof and notes issued therefor and all obligations thereunder arising on the part of the city may be cancelled and terminated and held for naught, and that the appellant who is the holder of said notes, his attorneys and agents, his assignees, and all persons claiming through or under him may be permanently enjoined and restrained from taking any steps to collect thereunder or taking any steps to attempt the collection of the principal and interest thereon.

Such action is in conflict with the holding of the Supreme Court of Illinois in the case of Stripe v. Yager, 346 Ill. 324, which was a direct proceeding in chancery brought for the purpose of enjoining the furtherance and the carrying out of the provisions as contained in the above resolution of the city council of Wyoming, passed under date of July 13, 1920. In the purchase of these premises. It was held in that case that the city of Wyoming had a lawful right to purchase the premises for the purposes indicated, and in the manner in which they were purchased. The above case not only determined the right of the city to make such purchase, but fixed its liability therefor.

The bill herein seeks to inject fraud into the transaction of the purchase of the property. The allegations of the bill in this respect are all directed toward the owners of the property and the mayor of the city at the time of such purchase, and the allegations of collusion as between these parties are based purely upon information and belief. The purchase was made by act of the common council of the city of Wyoming and there is no charge in the bill of fraud upon the part of that governing body. It has been held that the acts of the members of a city council who vote for any measure can not be impeached by an inquiry into the motives of the members of such council who vote for such measure. It is a well known rule of law that the knowledge and good faith of a legislature are not open

to question and its motives can not be inquired into. The courts must always assume that the legislative discretion has been properly exercised, Murphy v. C.R.I. & P. Ry. Co., 247 Ill. 614, 619; and in that case on page 619 of the opinion, it is said: "We know of no reason why the same rule should not govern in the case of the exercise of legislative power granted to a city council." The Supreme Court in the Stripe v. Yager case, supra, held that the act of the city council of Waukegan in the purchase of this property was a valid exercise of its powers; therefore, the motives for the passage of such resolution by the members of the city council are not now open to inquiry. It is stated in the case of Tribune Co. v. Thompson, 345 Ill. on page 443 of the opinion, that: "The motives of a city council in the exercise of its legislative powers can not be made the subject of inquiry by the courts. Whether, in the light of subsequent events, good judgment was exercised by the city council * * * * * is a question with which the court has no concern."

There is no attempt made in the bill of complaint to challenge or impugn the motives or purposes of the common council of the city of Waukegan, in the aforesaid transaction. As previously stated, all allegations of improper conduct and fraudulent purposes are directed toward the then mayor of said city, and the owners of these premises, and such allegations are based only upon information and belief. Cities act by and through their common councils. Changes in city administration can not be permitted to impair the legal and binding obligations of former city administrations. The bill of complaint is totally silent as to any fraud or improper motives on the part of the common council of the city of Waukegan in this matter and no facts are alleged therein which would authorize a court of equity to interfere with the enforcement of appellant's rights. The judgment of the circuit court denying the motion of

to question and its motives can not be inquired into. The courts have always assumed that the legislative discretion has been properly exercised, Murphy v. C.R.I. & P. Ry. Co., 241 U.S. 614, 618; and in that case on page 618 of the opinion, it is said: "We know of no reason why the same rule should not govern in the case of the exercise of legislative power granted to a city council." The Supreme Court in the Hughes v. Tyler case, supra, held that the act of the city council of Washington in the purchase of this property was a valid exercise of its powers; therefore, the motives for the passage of such resolution by the members of the city council are not now open to inquiry. It is stated in the case of Tribune Co. v. Thompson, 242 U.S. on page 442 of the opinion, that: "The motives of a city council in the exercise of its legislative powers can not be made the subject of inquiry by the courts. Whether, in the light of subsequent events, good judgment was exercised by the city council - * * * is a question with which the court has no concern."

There is no attempt made in the bill of complaint to challenge or impugn the motives or purposes of the common council of the city of Hoboken, in the aforesaid transaction. As previously stated, all allegations of improper conduct and fraudulent purposes are directed toward the then mayor of said city, and the owners of these premises, and such allegations are based only upon information and belief. Cities act by and through their common councils. Changes in city administration can not be permitted to impair the legal and binding obligations of former city administrations. The bill of complaint is totally silent as to any fraud or improper motives on the part of the common council of the city of Hoboken in the matter and no facts are alleged therein which would authorize a court of equity to interfere with the enforcement of appellants' rights. The judgment of the circuit court dmying the motion of

appellant to dissolve the temporary injunction issued herein is reversed and this cause remanded with directions to said court to enter its order dissolving such temporary injunction.

Reversed and remanded with directions

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8704

137

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On DEC 5 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8704 Agenda No. 12.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1933.

Margaret A. Hess and J. L. Hess,
Partners under the name of
The Hess Agency,
Appellees,

vs.

Appeal from Circuit Court, Lee County.

Howard Murray,
Appellant

HUFFMAN-J.

This is an action brought by appellees to recover for commission claimed due from appellant pursuant to an agreement between the parties for the sale of appellant's farm, consisting of 200 acres. Appellees contend that appellant entered into an agreement with them as his agents for the sale of this land and agreed to pay them a commission of $400 in the event they sold the land at $150 per acre.

The evidence discloses that appellees interested one Carl Blum in the purchase of appellant's farm and that after some negotiation back and forth between the prospective purchaser and appellant, that an offer of $19,000 was finally secured by appellees from the said Blum and agreed to by the appellant. The details of the purchase and the manner in which the sale price was to be paid, is claimed by appellees to have been gone into fully and to have been understood and agreed to by appellant. Appellees claim that due to the reduced price at which appellant was selling his farm, it was agreed between them that appellees' commission should be reduced to $300. Following these negotiations between the parties, the appellant refused to sell the farm to the purchaser secured by appellees,

General No. 8706. Agenda No. 12.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1927.

Margaret A. Hess and J. L. Hess,
partners under the name of
The Hess Agency,
Appellees,

Appeal from Circuit
Court, Lee County.

vs.

Ezekiel Murray,
Appellant

MUTTRAM-J.

This is an action brought by appellees to recover for commission claimed due from appellant pursuant to an agreement between the parties for the sale of appellant's farm, consisting of 200 acres. Appellees contend that appellant entered into an agreement with them as his agents for the sale of this land and agreed to pay them a commission of $400 in the event they sold the land at $150 per acre.

The evidence discloses that appellees interested one Carl Blum in the purchase of appellant's farm and that after some negotiation back and forth between the prospective purchaser and appellant, that an offer of $19,000 was finally secured by appellees from the said Blum and agreed to by the appellant. The details of the purchase and the manner in which the sale price was to be paid, is claimed by appellees to have been gone into fully and to have been understood and agreed to by appellant. Appellees claim that due to the reduced price at which appellant was selling his farm, it was agreed between them that appellees' commission should be reduced to $300. Following these negotiations between the parties, the appellant refused to sell the farm to the purchaser secured by appellees,

and negotiated a sale of the premises himself to another person for $1000 more money than the price that the said Flum was to pay. Appellees subsequently brought their suit in the justice of the peace court to recover their commission, where they recovered a judgment for the sum of $300. Upon appeal to the Circuit Court of Lee county, the cause was heard before the court without a jury. The court rendered judgment against appellant in the sum of $300. While the evidence is somewhat in conflict, yet, it discloses that appellees did secure such prospective purchaser for the sum of $19,000, and there are many facts in evidence relative to the negotiations regarding the offer, the conduct of appellant with reference to reducing the sale price of his farm, and the reduction of appellees' commission.

The trial court had the advantage of seeing and hearing the witnesses, and from the state of the record herein, we are unable to say that the judgment is against the manifest weight of the evidence. The judgment is therefore affirmed.

Judgement affirmed.

and negotiated a sale of the premises himself to another person for $1000 more money than the price that the said Hum was to pay. Appellees subsequently brought their suit in the justice of the peace court to recover their commission, where they recovered a judgment for the sum of $200. Upon appeal to the circuit court of Lee county, the cause was heard before the court without a jury. The court rendered judgment against appellant in the sum of $200. While the evidence is somewhat in conflict, yet, it disclosed that appellees did secure such prospective purchaser for the sum of $19,000, and there are many facts in evidence relative to the negotiations regarding the sale, the conduct of appellant with reference to reducing the sale price of his farm, and the reduction of appellees' commission.

The trial court had the advantage of seeing and hearing the witnesses, and from the state of the record herein, we are unable to say that the judgment is against the manifest weight of the evidence. The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8706

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8706 Agenda No. 15

In the Appellate Court of Illinois

Second District

October Term, A. D. 1933

Charles E. Berry, Receiver of
Farmers State Bank of Princeville,
a corporation,

appellant,

vs.

Frank German and Sue D. Redfern,
et al,

appellees,

Appeal from Circuit Court
of Peoria County

HUFFMAN - J.

This was a bill in chancery filed by appellant as receiver of the Farmers State Bank of Princeville, to foreclose a trust deed upon certain real estate. On January 2, 1925, Eleanor K. Graham and John B. Graham, her husband, made and executed their four promissory notes in the principal sums of $1000, $1300, $2000, and $1200 respectively, and secured the payment of said notes by trust deed upon certain real estate in Peoria county. The trust deed and notes were delivered to the above bank, where the mortgagors obtained the loan. The bank later sold the $1000 note to appellee, Frank German and the $1300 note to appellee, Sue D. Redfern. The bank retained in its possession the two remaining notes given by the mortgagors as aforesaid.

On May 18, 1931, appellant, Charles E. Berry was appointed receiver of the said Farmers State Bank of Princeville. Subsequently he brought this bill in the circuit court of Peoria county to foreclose the trust deed. Appellees were made parties to the bill and filed their respective answers, setting up the purchase of the notes aforesaid from the bank, and alleging that they had a priority of lien upon the premises described in the trust deed, and to the proceeds to be realized from the sale

General No. 8708 Agenda No. 15

In the Appellate Court of Illinois

Second District

October Term, A. D. 1932

Charles E. Berry, Receiver of

Farmers State Bank of Princeville,

a corporation,

appellant,

Appeal from Circuit Court

of Peoria County

vs.

Frank German and Sue D. Medlern,

et al,

appellees.

HUTCHESON - J.

This was a bill in chancery filed by appellant as receiver of the Farmers State Bank of Princeville, to foreclose a trust deed upon certain real estate. On January 2, 1925, Eleanor K. Graham and John B. Graham, her husband, made and executed their four promissory notes in the principal sums of $1000, $1500, $2000, and $1200 respectively, and secured the payment of said notes by trust deed upon certain real estate in Peoria county. The trust deed and notes were delivered to the above bank, where the mortgagors obtained the loan. The bank later sold the $1000 note to appellee, Frank German and the $1200 note to appellee, Sue D. Medlern. The bank retained in its possession the two remaining notes given by the mortgagors as aforesaid.

On May 18, 1931, appellant, Charles E. Berry was appointed receiver of the said Farmers State Bank of Princeville. Subsequently he brought this bill in the circuit court of Peoria county to foreclose the trust deed. Appellees were made parties to the bill and filed their respective answers, setting up the purchase of the notes aforesaid from the bank, and alleging that they had a priority of lien upon the premises described in the trust deed, and to the proceeds to be realized from the sale

thereof, and that they were entitled to be satisfied out of the proceeds of such sale before any of the same was applied to the payment of the notes held by the said bank. Each of the appellees also filed a cross-bill alleging in substance the same facts as set up in their answers and praying that the court would decree them to be entitled to be paid in full out of the proceeds from the sale of the mortgaged premises, before any of such proceeds should be applied to the satisfaction and payment of the notes held by said bank.

The cause was referred to the master, who found among other things, that the trust deed and notes were executed and delivered to the bank by the mortgagors as aforesaid; that the said bank sold and delivered the notes as aforesaid, to the appellees; that the bank retained possession of the two remaining notes; that all of said notes matured at the same time and were secured by the trust deed without any preference or priority as to payment; that the bank by the sale and delivery of the notes to appellees, thereby lost its equality of lien as to the notes retained by said bank. The master held that the appellees were entitled to ~~exfirst~~ priority of lien over the appellant, and were entitled to be first paid from the proceeds derived from the sale of the premises. The master found the total amount due upon the mortgage indebtedness and found that the sum of $1359.58 was due to appellee, Sue D. Redfern, and the sum of $1105.83 due to appellee, Frank German. He also found that after the payment of fees, costs and commissions, that the appellees should be paid, and that the appellant as receiver of said bank, was then next entitled to be paid from the proceeds of said sale.

Appellant filed objections to the master's report, which objections were overruled by the master and permitted to stand as exceptions to the report upon the hearing before the court.

thereof, and that they were entitled to be satisfied out of the proceeds of such sale before any of the same was applied to the payment of the notes held by the said bank. Each of the appellees also filed a cross-bill alleging in substance the same facts as set up in their answers and praying that the court would decree them to be entitled to be paid in full out of the proceeds from the sale of the mortgaged premises, before any of such proceeds should be applied to the satisfaction and payment of the notes held by said bank.

The cause was referred to the master, who found among other things, that the trust deed and notes were executed and delivered to the bank by the mortgagors as aforesaid; that the said bank sold and delivered the notes as aforesaid, to the appellees; that the bank retained possession of the two remaining notes; that all of said notes matured at the same time and were secured by the trust deed without any preference or priority as to payment; that the bank by the sale and delivery of the notes to appellees, thereby lost its equality of lien as to the notes retained by said bank. The master held that the appellees were entitled to maintain priority of lien over the appellant, and were entitled to be first paid from the proceeds derived from the sale of the premises. The master found the total amount due upon the mortgage indebtedness and found that the sum of $1339.58 was due to appellee, Sue D. Rydtrn, and the sum of $1105.83 due to appellee, Frank German. He also found that after the payment of fees, costs and commissions, that the appellees should be paid, and that the appellant as receiver of said bank, was then were entitled to be paid from the proceeds of said sale.

Appellant filed objections to the master's report, which objections were overruled by the master and permitted to stand as conclusions to the report upon the hearing before the court.

The court thereafter entered its decree overruling the exceptions to the master's report, and confirming same; finding that the said bank had sold and delivered the notes to appellees as claimed; that all of said notes matured at the same time and were secured by the trust deed without preference or priority; and that the bank by transferring the notes to appellees as aforesaid, thereby lost its equality of lien as to the notes retained by the bank; and decreed that the appellees were entitled to priority of lien over appellant, and should be first paid from the proceeds of the sale of said premises before appellant should receive any part thereof upon the payment of the notes held by it.

Appellant complains of this ruling of the court and urges that it should be permitted to share equally with appellees in the proceeds arising from the sale of the premises, and that the cause should be reversed and remanded with directions to enter a decree to that effect.

This court had occasion to pass upon the identical question involved in this cause in the case of Peoples Natl. Bk. of Monmouth v. Johnson, 271 Ill. App. 507, wherein this court held adversely to the contention of appellant. We reaffirm the position taken in that case, to the effect, that when a mortgagee assigns one or more notes and retains the remainder of the series, that in the absence of an intention clearly to the contrary, the assignee of such notes is entitled to priority of lien as against the mortgagee. It would be contrary to equity and good faith to permit the mortgagee, after receiving the money for this part of the claim, to come into competition with his assignee, when the property proved insufficient to pay the claims of both. The above case is conclusive of the question involved in this appeal, and the judgment of the circuit court herein, is affirmed.

Judgment affirmed.

The court thereafter entered its decree overruling the exceptions to the master's report, and confirming same; finding that the said bank had sold and delivered the notes to appellees as claimed; that all of said notes matured at the same time and were secured by the trust deed without preference or priority; and that the bank by transferring the notes to appellees as aforesaid, thereby lost its equality of lien as to the notes retained by the bank; and decreed that the appellees were entitled to priority of lien over appellant, and should be first paid from the proceeds of the sale of said premises before appellant should receive any part thereof upon the payment of the notes held by it.

Appellant complains of this ruling of the court and urges that it should be permitted to share equally with appellees in the proceeds arising from the sale of the premises, and that the cause should be reversed and remanded with directions to enter a decree to that effect.

This court had occasion to pass upon the identical question involved in this cause in the case of People Ex rel. Mr. of Monmouth v. Johnson, 271 Ill. 100, 109, wherein this court held adversely to the contention of appellant. We reaffirm the position taken in that case, to the effect, that when a mortgagee assigns one or more notes and retains the remainder of the series, that in the absence of an intention clearly to the contrary, the assignee of such notes is entitled to priority of lien as against the mortgagee. It would be contrary to equity and good faith to permit the mortgagee, after receiving the money for this part of the claim, to come into competition with his assignee, when the property proved insufficient to pay the claims at par. The lower court in the case in consideration of the question involved in this appeal, and the judgment of the circuit court herein, is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

8715

139

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

272 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On DEC 6 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

GENERAL NO. 8715 AGENDA NO. 18

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1933.

Richard Kutchback, by Lyle Kutchback, his Next Friend,
Appellant

vs.

Oliver Miller,
Appellee.

Appeal from Circuit Court, Stephenson County.

HUFFMAN-J.

Appellant instituted this suit in the Circuit Court of Stephenson county to recover damages from appellee for personal injuries claimed by appellant to have been sustained because of the negligent operation by appellee, of his automobile. The accident, resulting in the injuries complained of, occurred on September 16, 1930, in the City of Freeport, Illinois. Richard Kutchback at that time was a child between five and six years of age. He was attending on that day a public school in said city of Freeport, known as the Lincoln Avenue School. Some 285 pupils attended this school between the first and sixth grades. On the day in question and shortly before the hour of 12 o'clock noon, the first and second grades of said school were dismissed. Appellant was among those dismissed at that time. These two grades were composed of approximately 130 pupils.

Appellant upon leaving the said Lincoln School was proceeding westwardly along the north side of Lincoln Boulevard. He started to run across this street to the south side thereof, and while in the act of crossing said street was struck by appellee's automobile. Appellant claims as a result of said accident that he sustained serious injuries; that he received a fracture of the skull, which injured the brain and which necessitated a surgical operation upon

AGENDA NO. 18

No. 8715

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1938.

Richard Kutchback, by Lyle Kutchback, his Next Friend,
Appellant

Appeal from Circuit Court, Stephenson County.

vs.

Oliver Miller,
Appellee.

MR. PRESIDING JUSTICE:

Appellant instituted this suit in the Circuit Court of Stephenson county to recover damages from appellee for personal injuries claimed by appellant to have been sustained because of the negligent operation by appellee, of his automobile. The accident, resulting in the injuries complained of, occurred on September 16, 1930, in the City of Freeport, Illinois. Richard Kutchback at that time was a child between five and six years of age. He was attending on that day a public school in said city of Freeport, known as the Lincoln Avenue School. Some 285 pupils attended this school between the first and sixth grades. On the day in question and shortly before the hour of 12 o'clock noon, the first and second grades of said school were dismissed. Appellant was among those dismissed at that time. These two grades were composed of approximately 130 pupils.

Appellant upon leaving the said Lincoln School was proceeding westwardly along the north side of Lincoln Boulevard. He started to run across this street to the south side thereof, and while in the act of crossing said street was struck by appellee's automobile. Appellant claims as a result of said accident that he sustained serious injuries; that he received a fracture of the skull, which injured the brain and which necessitated a surgical operation upon

the skull and the brain; that as a result thereof, he has sustained a paralysis of one side; that his nervous system is permanently weakened and injured; and that his mental functions are permanently injured and impaired.

The declaration in this case consisted of eight counts, the first 4 of which were based on negligence and the 5th., 6th., 7th and 8th counts alleged wilful and wanton conduct on the party of appellee. The trail court took counts 3, 5, 6, 7 and 8 from the consideration of the jury. The verdict of the jury was in favor of the defendant below, and plaintiff below has prosecuted this appeal.

Appellant urges for reversal that the court erred in giving instructions numbers 8, 9 and 13 on behalf of appellee. Defendant's given instruction #8 is as follows: "You are instructed that if you find from the evidence that the injury to the plaintiff resulted directly and proximately from his own negligence and not directly or proximately from any negligence of the defendant, then and in that case the plaintiff can ot recover and your verdict should be for the defendant." It was error to give this instruction, as the appellant was under seven years of age and the rule of contributory negligence does not apply in such case. Chicago City Ry. Co. v. Touhy 196 Ill. 410; I.C. R.R. Co. v. Jernigan 198 Ill. 297; Fannon v. Morton 228 Ill. App. 415.

Defendant's given instruction number 9 is as follows: "The court instructs the jury that regardless of the speed of the defendant's car at the time of the accident and immediately prior thereto, as you may find the same from the evidence, you cannot find for the plaintiff unless you likewise find from the evidence that such speed was the proximate or direct cause of the accident." This instruction was erroneous because it limited the question of negligence on the part of the defendant to purely one of speed, and disregarded all other elements of negligence.

the world and the brain; that as a result thereof, he has sustained a paralysis of one side; that his nervous system is permanently weakened and injured; and that his mental functions are permanently injured and impaired.

The declaration in this case consisted of eight counts, the first 4 of which were based on negligence and the 5th., 6th., 7th and 8th counts alleged wilful and wanton conduct on the party of appellee. The trial court took counts 3, 5, 6, 7 and 8 from the consideration of the jury. The verdict of the jury was in favor of the defendant below; and plaintiff below has prosecuted this appeal.

Appellant urges for reversal that the court erred in giving instructions numbers 8, 9 and 15 on behalf of appellee. Defendant's given instruction #8 is as follows: "You are instructed that if you find from the evidence that the injury to the plaintiff resulted directly and proximately from his own negligence and not directly or proximately from any negligence of the defendant, then and in that case the plaintiff can of recover and your verdict should be for the defendant." It was error to give this instruction, as the appellant was under seven years of age and the rule of contributory negligence does not apply in such case. Chicago City Ry. Co. v. Lundy 198 Ill. 410; I.C. R.R. Co. v. Jerelman 199 Ill. 327; Jones v. Martin 229 Ill. 419. 422.

Defendant's given instruction number 9 is as follows: "The court instructs the jury that regardless of the speed of the defendant's car at the time of the accident and immediately prior thereto, as you may find the same from the evidence, you cannot find for the plaintiff unless you likewise find from the evidence that such speed was the proximate or direct cause of the accident." This instruction was erroneous because it limited the question of negligence on the part of the defendant, to merely the of speed, and disregarded all other elements of negligence.

Defendant's given instruction number 13 is as follows: "If you find from the evidence in this case that the plaintiff ran into the side of the defendant's car you should find the defendant not guilty." This instruction was erroneous because it eliminated and disregarded all elements of negligence on the part of the defendant, and stated to the jury that if the plaintiff ran into the side of the defendant's car that they should find the defendant not guilty. This instruction not only eliminated all questions of negligence on the part of the defendant but it ignored the fact that contributory negligence is no defense against a child under seven years of age.

In line with the above instruction, defendant submitted a special interrogatory, which the court granted and gave to the jury and which is as follows: "Did the plaintiff in this case, Richard Kutchback, run into the side of the automobile driven by the defendant, Oliver Miller? Answer "Yes,' or 'No." The jury answered this interrogatory, "Yes," and returned a verdict of not guilty. Appellant urges that it was error to give the above interrogatory. This interrogatory was improper to be submitted. It related only to evidentiary facts and presented such facts to the jury as material and controlling, when they were not. Chicago City Ry Co. v. Jordan 215 Ill. 390.

For the reasons above indicated, this case is reversed and remanded.

Reversed and remanded.

Defendant's then instruction number 13 is as follows: "If you find from the evidence in this case that the plaintiff ran into the side of the defendant's car you should find the defendant not guilty." This instruction was erroneous because it eliminated and disregarded all elements of negligence on the part of the defendant, and stated to the jury that if the plaintiff ran into the side of the defendant's car that they should find the defendant not guilty. This instruction not only eliminated all evidence of negligence on the part of the defendant but it ignored the fact that contributory negligence is an affirmative defense, which was proven by the defendant. Driver Gillard answer "Yes," or "No." The jury answered this interrogatory, "Yes," and returned a verdict of not guilty. Appellant urges that it was error to give the above interrogatory. This interrogatory was improper to be submitted. It related only to evidentiary facts and presented such facts to the jury as material and controlling, when they were not. Chicago City Ry. Co. v. Carter 210 Ill. 234.

In the reasons cited indicated, this case is reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

PUBLISHED IN ABSTRACT

Jess Sheets, as Administrator of the Estate of Walter F. McWade, Deceased, Appellee, v. Chicago & Eastern Illinois Railway Company, a Corporation, Appellant.

Appeal from Circuit Court of Vermilion County.

APRIL TERM, A. D. 1933.

Gen. No. 8752. **Agenda No. 10.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee, Jess Sheets who is sueing as Administrator of the Estate of Walter F. McWade, deceased, for the benefit of the next of kin of the deceased, in an action on the case for $1,000.00 damages, for causing the death of the deceased in an automobile crossing accident at a country crossing on the railroad of the appellant about four miles north of Danville, on December 20, 1930.

The appellant makes the following statement in his brief, concerning the case and the pleadings therein:

"This action was brought to the May term, 1931, of the Circuit Court of Vermilion County, against the Chicago & Eastern Illinois Railway Company, Town of Newell, in Vermilion County, Illinois, a municipal corporation, J. W. Justice, Commissioner of Highways of said Town, and Walter DeNeal, a farmer who owned land on the west side of the railroad.

The declaration was in three counts, and each count averred that the railroad track ran in a northerly and southerly direction through the Town of Newell, and that there was a country road which ran in an easterly and westerly direction at right angles across the double tracks of the railroad; that Walter DeNeal owned the land on the west side of the railroad crossing, and that Walter DeNeal negligently constructed and maintained a fence, consisting of boards and posts, from the south side of said highway north a distance of forty feet, and then placed a board gate from that point to the north side of the highway; and that the railroad placed its wire fence over said board fence south of said gate; and that the Town of Newell and J. W. Justice, Highway Commissioner of said Town, knowingly and negligently permitted said Walter DeNeal to so obstruct and close said public highway on the west side of said railroad crossing; that the rail-

road at that point was on a grade of, to-wit: eight feet, and that there was no warning and no gate, fence, barricade, or other obstruction in said highway, on the east side of said crossing, to give notice to the traveling public that the highway was closed on the west side thereof; that Walter F. McWade was riding in a Chevrolet coupe driven by Mary Elizabeth Sheets in a westerly direction on said public highway, and in the exercise of all due care and diligence for his own safety, and was struck by a south-bound train traveling on the west track over said highway crossing, and was killed, leaving his father and mother and three brothers and sisters as his next of kin.

Each count was substantially the same, except that in the first count the negligence alleged against the railroad company was that it ran its train at sixty miles an hour; and, in the second count, alleged that it rang no bell or sounded a whistle, as required by statute; and the third count alleged that the above situation created an extraordinary hazardous, unsafe and dangerous crossing, and no particular negligence was alleged against the railroad, except that it ran its train on said track with knowledge of said alleged dangerous and hazardous crossing."

As to the Personnel of the Parties and manner of the accident, the appellant's counsel say:

"In this case the evidence shows that Walter McWade was a young man nineteen years of age, and lived at Pittsburg, Pennsylvania, and was a Junior attending school at the University of Illinois, at Urbana, Illinois. He was an honor student at his home high school, and was making good grades in school in an engineering course, and a very promising young man. At the time of his death he was riding in a Chevrolet coupe belonging to Mary Elizabeth Sheets, who lived at the little town of Bismarck, in Vermilion County, about three and one-half miles north of the scene of the accident, and she was about the same age, and was a school teacher. McWade had been keeping company with Miss Sheets, and had frequently visited at her home. On December 20, 1930, he left the University and was on his way to his home in Pennsylvania, and stopped at Danville about two o'clock in the afternoon, where he met Miss Sheets, and intended to spend a few hours with her before leaving by train for his home. The weather was fair and dry, and Miss Sheets had her automobile, and together they started out for a drive, killing time until his train was due.

From Danville north is a paved highway known as the "Dixie," and from it about three miles north of Danville is a gravel road that goes east across the railroad of appellant, at what is known as the West Newell road; then east of the railroad is another

gravel road that goes north, known as the Bismarck road. One mile north of the West Newell road there is a dirt road that goes west from the Bismarck road, across the railroad tracks, at which place the accident occurred.

The accident occurred a little after three o'clock in the afternoon, and Miss Sheets was riding on the left side of the Chevrolet coupe, and driving the car, and McWade was sitting at her right. The only evidence as to what they were doing at and before the time of the accident appears in the testimony of Bert Boswell, a witness for the plaintiff, who was in a field just east of the crossing. He said that the automobile was going west towards the crossing; that he was in the field to catch his horses; and that the automobile was going slowly, perhaps seven or eight miles an hour, and the occupants seemed to be busily engaged talking to each other and looking in no direction; that the automobile went up, and momentarily stopped with the front wheels apparently over the east rail, or northbound track, and suddenly the automobile seemed to lurch or jump forward and stop on the west, or south-bound track, and at about the same time the south-bound train of the defendant struck the automobile. Two men, H. M. Smitha and Fred F. Fearheiley, riding in the engine on the fireman's side, corroborated the witness Boswell as to the fact that the automobile momentarily stopped on reaching the northbound track, and then suddenly lurched forward and stopped on the southbound track at practically the same time as the engine reached that place. When the automobile lurched forward, one of the witnesses could see exhaust come out from the rear of the automobile."

Bert Boswell, who was a witness in the case, and apparently the only eye witness to the accident, in which appellee's intestate was killed, testified as follows:

"At the time of the accident I was living about forty rods east of the crossing on the north side of the road. I had lived there about three months. I was in the field close to this crossing at the time of the accident, after my horses. I judge I was about seventy-five feet east and a little to the north of the crossing, probably twenty-five feet out in the field. I was cornering the horses, trying to get hold of them in the corner, the corner there right by the crossing, at the southwest of my corn field. I saw the automobile come from the east. There were two in it. I did not know them at that time. It turned out later to be Mr. McWade's son and Miss Sheets. Miss Sheets was driving the car. Walter McWade was riding with her on the north side. The sun was shining, I believe. I was after my horses there, and I heard the train coming. I heard them

whistle at the crossing a mile north of there, and if they got down there I would have the horses to run around all over the field again if I did not catch them there. My horses were afraid of a whistle. There was no whistle whatever. The bell was not ringing. I would judge the train ran south of the crossing one hundred fifteen to one hundred twenty rods, something like that, I never measured it. I am not much experienced in estimating the rate of speed of trains, but the train was going pretty fast; I would judge, just guessing, that train was going about sixty-five miles. I have had no occasion to become familiar with the rate of moving trains or automobiles. I have an opinion as to how fast the train was going. I think about sixty-five miles. The automobile was going slow, I would judge about seven or eight miles per hour. After they got by me I did not see either of them in the car. I could not see them.

Q. Have you any way of knowing from what you saw whether either of them looked to the north or to the south?

A. I do not.

Q. Or what they were doing after they got by you?

A. No, sir.

Q. Or where they were looking?

A. No, sir.

Q. Or as to whether they did or did not listen?

A. I couldn't say.

This automobile approached the track on an incline. The auto pulled up with the front wheels about to the east rail and stopped, as though to shift gears or to stop, which, I could not tell; anyway, it stopped, just a short time. Then it lurched forward just as the train came down there. There are two tracks there. The train was coming on the west track from the north. There is a curve up about the woods. As the train approached from the north or east the woods would be between you and the train. The accident happened on the west or southbound track, I could not see whether the auto was standing or moving at the time of the actual collision. I do not know of anybody else at the crossing who witnessed the accident but myself. I went over to the crossing after the accident. I found parts of the automobile along the track. I found the body of the girl about one hundred fifty feet lying to the west of the tracks, down near the west right-of-way fence, but inside the right-of-way. I do not know where McWade's body was found. After the accident the train backed to the crossing."

The trial of the case resulted in a verdict finding the appellant guilty and assessing the damages sustained at $1,000.00. The appellant made a motion for a new trial and a motion in arrest of judgment. Both

motions were overruled by the Court; and the Court thereupon rendered judgment against the appellant on the verdict. This appeal is prosecuted to reverse the judgment.

The main question presented for review is one of fact, namely, that the verdict is against the weight of the evidence; especially in the matter of the care exercised by the deceased who was riding in the automobile in which he was killed, as a guest; and it is strongly argued that the deceased was not in the exercise of such care for his own safety as the law required of him. The evidence in the record, however, discloses, that the argument on this feature of the case is not well founded; and that the jury were warranted by the evidence in their finding in that feature of the case and in returning the verdict that they did. ~~H~~

An examination of the evidence in the record, does not disclose any reversible error; and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

(Six pages in original opinion)

PUBLISHED IN ABSTRACT

30

Illinois Power & Light Corporation, a Corporation, Appellant, v. Albert Overstreet, Appellee.

Appeal from Circuit Court of Vermilion County.

APRIL TERM, A. D. 1933.

272 I.A. 631

Gen. No. 8755. **Agenda No. 13.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

This case was commenced by the Appellee, Albert Overstreet, in the Circuit Court of Vermilion County against the Appellant, Illinois Power & Light Corporation, to recover damages for personal injuries suffered by him while riding in an automobile on North Vermilion Street in the City of Danville as the guest of the owner of the car, Norman Dale. The automobile in question at the time was driven by Dale; and collided with a snowplow operated by the appellant on North Vermilion Street during a snow storm. The collision occurred about 1:30 A. M. on March 22nd, 1932. The appellee, who is a traveling salesman by occupation, was a witness in his own behalf on the trial of the case, and gave the following account of the place and the manner in which the accident happened:

"On March 22nd, last, I suffered an accidental injury. It was about 1:30 o'clock A. M. on March 22, 1932, and the accident happened on North Vermilion Street in the six hundred block right about opposite the vacant lot North of Millikin's Dry Cleaning. That is on Vermilion Street in Danville, and that street runs north and south, and that is six blocks north of the center of Danville, and there is a railroad up there crossing Vermilion Street east and west, called the Big Four, and the accident happened about 125 to 150 feet south of the south rails of that track. I was riding as a passenger in Norman Dale's car. I was a guest and riding without pay. We were going north on Vermilion Street, and were up to this point in the automobile. As we went up there it was snowing and the wind was blowing, and the snow whirling around. It was a heavy snow storm. I saw some automobiles out, and as we went north we passed cars going south on Vermilion Street. One car passed us going north in the four hundred block right by Uncle Joe Cannon's house. We had been down town. I should say Vermilion Street was probably sixty feet wide, and was a paved street, asphalt, and brick in the center, and

with two street car tracks in the street, a double track, two rails for each track, or four rails. As we went north approaching that location there was an automobile in the block south of there along by where Dr. Cloyd lives, about a half block south of where the accident happened. It was standing along the east curb headed north, and I saw the tail light which was red, about fifty feet before we got to it, and there was another car in the next block up along by Millikin's parked near the curbing. I could see the tail light or red light, but could not see the car until we got closer. I was sitting on the right hand side in the automobile, and there was no windshield wiper in front of me. There was one on the other side, in front of the driver.

There is a Church there, and south of the Church is an east and west street called Davis Street, and that is the first street south of the railroad. From that street up until the time the accident happened I would say we were not going over twenty miles an hour, because Mr. Dale and I were riding along and we thought we heard a train, and started to slow down. We knew we were coming to the railroad track, and didn't know whether the gates were down. Yes sir, I knew there was a railroad track there, and I cross it every day almost. We were along by Millikin's when I thought I heard a train, and the driver eased up the throttle and let it coast. There were head lights on our automobile.

At that time from Davis Street north it was snowing and blowing, I would say almost a blizzard. I was on the right side of the car as we drove ahead going north leaned forward on the seat in order to watch and lookout. I was paying more attention to what was along the curbing, as well as what was in front of us, because the windshield was partly covered with snow and I couldn't see out the side window. I was looking along the curb so as not to run into any car, and warn the driver.

Our automobile was straddling the right hand rail of the east street car track, and we were riding up there and Norman says: 'My God, look there.' And before he got it out of his mouth, my face was in the windshield. After he made that remark I saw we had run into a big object which I afterward found to be a snow plow in front of us on the rails on the east track of the double tracks. I didn't see any light on the south end. If there was any I didn't see it. I was looking ahead. No sir, there was no person with a lantern guarding it in any way, or any lights or watchman. I couldn't see whether the gates of the railroad were down from that distance. It was snowing too badly.

When we ran into this sweeper, and my head went into the windshield, I got cut across the eye, and under

the chin, and my tongue, and I was bruised up, my legs and other parts of my body. No sir, I didn't have any of those injuries before. After my head went through the windshield I opened the door of the car and got out and walked over east to the curbing.

I only noticed what I could see in the street when I got out as to what we had collided with. I saw it was a street car sweeper. I could tell what it was. It was a street car with a brush on the end of it.

After I got over on the curb I fainted, and after that I don't know what happened. I woke up on the operating table at the hospital, but I have a vague recollection of being put in a car. There were no horns or warning of any kind sounded as we approached this sweeper that I heard."

The declaration filed in the case consists of an original count and two additional counts. The original count charges general negligence on the part of the appellant's servants in operating an electric car snow sweeper which resulted in the collision. The first additional count alleges:

"That in the course of its business the defendant operated an electric car of the weight of to-wit: ten tons, and of the height of about nine feet, and of great length, upon the front of which was attached a rotary sweeping brush, and which said car and brush was used for the purpose of sweeping snow off of the tracks, and right-of-way of defendant in said streets, and was commonly called a snow sweeper, which said sweeper was managed and controlled by divers servants of defendant in the conduct of its business.

That in and about the clearing of snow from the tracks, said sweeper, in charges and control of two servants, was going north upon the easterly one of the double track of defendant in said street, and had arrived at a point about 250 feet south of the Big Four Railroad crossing, and that in going north the east side of the sweeper was about ten feet east of the center of the street.

Further avers that at said time, and for some time before, that there was a violent storm of wind and snow raging in said city, to such an extent that the snow surrounded, enveloped, and obsecured said sweeper, so that a person approaching such sweeper on the track from the south would not see and know of its presence until to-wit: five feet south of the sweeper, whereby danger of collision between the automobile in which he was riding, and such sweeper, and danger to passengers in such automobile was imminent, which fact of danger and liability defendant, by its servants, then and there knew, or could have known by the exercise of due care on their part.

That there was no warning light on the rear end of said sweeper to give warning to persons approaching

from the rear, or south, in automobile driven along said street, including plaintiff traveling as aforesaid, of the existance of said sweeper there on the track, surrounded by snow as aforesaid.

That defendant, by its servants, in violation of duty, carelessly and negligently permitted and allowed the snow sweeper to stand there on the track, without such warning light in the rear, and that by reason of such carelessness and negligence, the driver of the automobile in which plaintiff was riding was not warned of the presence ofsaid sweeper, and said automobile in which plaintiff was riding ran with great force and violence into the rear end of said sweeper, and collided with the same."

The second additional count contains substantially the same averments concerning the alleged negligence of the appellant.

The appellant demurred to the original count which charges general negligence; and the Court overruled the demurrer. A demurrer was also filed to the additional counts, which was also overruled by the Court. The appellant thereupon pleaded the general issue to all the counts and the case proceeded to trial. The trial of the case resulted in a verdict finding the appellant guilty; and assessing the appellee's damages at $6250.00. Appellant made a motion for a new trial and in arrest of judgment; both motions were denied; and thereupon the Court rendered judgment on the verdict. This appeal is prosecuted to reverse the judgment rendered.

Various questions are presented for review, and argued by the appellant. It is contended concerning the question of negligence which is charged against the appellant, that the verdict is against the weight of the evidence; and that the appellee was guilty of contributory negligence. These were the very questions which were submitted to the jury for their consideration and determination; and it was the peculiar province of the jury to consider and determine them. The jury by their verdict, found adversely to appellant's contention concerning the weight of the evidence upon the points referred to. An examination of the evidence in the record does not lead us to the conclusion that the finding of the jury was contrary to the weight of the evidence; and this Court would not be justified in holding, under the circumstances, that the jury should have determined the weight of the evidence on these controverted questions differently or otherwise.

It is also contended, that the original count of the declaration which charges general negligence, is insufficient in law to sustain the verdict. We cannot agree with this contention. The negligence charged in the

count referred to, concerns alleged improper and careless operation of the electrically propelled snow plow car; and is therefore within the rule defined by the Supreme Court in the case of *Chicago City Ry. Co.* v. *Jennings,* 157 Ill. 274. It was not error to overrule appellant's demurrer to the count.

Error is also assigned on the fact, that there were figures written on the back of the instruction concerning the form of the verdict which was given by the Court; but the record discloses that the figures were not there when the instruction was given. There is no evidence to show when the figures were put on the back of the instruction, nor who put them there; nor that they were considered by the jury, or that the jury saw them. We conclude, therefore, that there is no error in this feature of the case.

Appellant also complains about the second and third instructions given for the appellee, but we find that these instructions are substantially a correct statement of the law pertinent to the facts shown by the evidence.

Appellant also criticizes the Court's modification of the 9th, 10th and 11th instruction presented by the appellant. We find that the modifications of the instructions were proper. The instructions as presented were misleading, and in conflict with the rule announced by the Supreme Court in *Reivitz v. Chicago R. T. Co.,* 327 Ill. 207, and in *Bernier v. Railroad,* 296 Ill. 464.

Objections are also made by appellant's counsel to the Court's refusal to give appellant's instructions 1, 2, 3, 4, 5, 6, 7 and 8. To consider these objections in detail would unduly lengthen this opinion. It is sufficient to say, in reference thereto, that instruction 1 is in conflict with the principles laid down in *Nelson v. Knatzger,* 109 Ill. App., 296; *R. R.* v. *Kelly,* 182 Ill. 267; *Winn v. R. R.,* 239 Ill. 132; *R. R. v. Barton,* 53 Ill. Ap. 69.

Instruction 3 is not only argumentative, but it singles out certain matters of fact; and directs the jury to consider them. It was therefore properly refused. *Rudin v. Wheelock,* 249 Ill. Ap. 249; *Chaney v. Baker,* 304 Ill. 362; *Wicks v. Walden,* 228 Ill. 56.

Instructions 4, 5, 6, 7 and 8, 9, 10 and 11 were all properly refused for the reason that they are misleading with reference to the facts in evidence; or assumed as facts, matters not proven or not applicable to the facts proven; or assumed facts as material, that were immaterial under the issues in the case.

We feel warranted in saying in this connection that the appellant tendered twenty-five instructions, eight of which were given, six were modified and eleven refused. Both the Supreme and Appellate Courts have

repeatedly condemned the practice of presenting so many instructions in this kind of an action.

Adams v. *Smith,* 58 Ill., 417;
Chicago Ry. v. *Mitchell,* 159 Ill., 406;
Voorhees v. *Chicago,* 215 Ill. Ap., 531;
Daubach v. *Drake Hotel,* 243 Ill. Ap., 298.

The Supreme Court pointed out in *Adams* v. *Smith,* 58 Ill., 417:

> "It was never contemplated under the provisions of the Practice Act that the court should be required to give a vast number of instructions amounting in the aggregate to a lengthy address * * * * a few concise statements of the law applicable to the facts are all that can be required and are all that can serve any practical purpose."

What the Supreme Court said in the Adams case is especially pertinent to this case.

The record does not disclose any error in the rulings of the Court on matters of evidence; nor is the amount of the verdict excessive as insisted by appellant. It is clear from the evidence, that the appellee must have endured much pain and suffering in the treatments and operations which he had to undergo in consequence of his injuries. The amount of his hospital and physicians' bills alone was more than $1,500.00.

For the reasons stated, the judgment is affirmed.

Judgment affirmed.

PUBLISHED IN ABSTRACT

Frank Kehl, Plaintiff and Appellee, v. Earl Corbett and Minnie Corbett, Defendants and Appellants.

Appeal from Circuit Court of Morgan County.

APRIL TERM, A. D. 1933.

Gen. No. 8758. **Agenda No. 16.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

In this case the appellee, Frank Kehl, sued the appellants, Earl Corbett and Minnie Corbett, to recover $71.50, which he claimed was due him for work and labor, performed for the appellants. The case was tried in the Circuit Court of Morgan County (a jury having been waived) on appeal from the judgment of a Justice of the Peace. The trial court found in favor of the appellee and assessed his damages at $71.50, the full amount of his claim.

The question presented for review on the errors assigned is one of fact, namely, whether or not the finding of the Court in favor of the plaintiff is against the weight of the evidence.

There were but two witnesses for the appellee, namely, the appellee and his son. The appellee's testimony is as follows:

"I live at Woodson. I did some work for Dr. Corbett. I worked 143 hours at fifty cents an hour.

Q. Have you any way to determine how many hours you worked?

A. Yes, I have got it put down. I was to receive fifty cents an hour. I done carpenter work, brick laying and concreting. I first constructed the roof over the porch. I put that roof on; made a concrete pavement underneath the porch, about 10 by 14. Then I underpinned the house with brick on the south side. I then built a flue about 14 feet, lacking about one foot on the top. I never received a nickel for the work."

Ralph Kehl, appellee's son, testified as follows:

"I am a son of the man who just testified. I was around there when he did the work. I know what he did there. He built a couple of walks—helped build them. He built part of the porch and also a brick platform to the house, and he worked around there hauling dirt, and also helped build a chimney. Mr. Corbett did not pay me anything for my father. All I ever received was fifty cents for an axe handle. My father

bought the axe handle—he did not have fifty cents—he gave him fifty cents. That is all the money I ever got for my father from Mr. Corbett."

On the other hand, the appellant Minnie Corbett testified that the appellee had agreed to do the work for 25c an hour, which would amount to $49.50; that he had presented his bill for that amount after he had done the work; and that the bill was paid in full at that time.

Harvey Grider and Lawrence Henry were called as witnesses, and they corroborated the appellants in the testimony given by them. They testified in substance that they were present when the sum of $49.50 was paid to the appellee; and that he accepted this sum in full settlement of the amount due him.

In this condition of the record and the evidence upon the sole controverted question of fact in the case, we conclude, that there is a clear preponderance of the evidence in favor of the appellants; and that the trial court was in error in its finding of facts upon which the judgment was rendered. Judgment is therefore reversed and the cause remanded.

Reversed and remanded.

(Two pages in original opinion.)

PUBLISHED IN ABSTRACT

32

Joseph Haase, Frank E. Morrison and Henry F. O'Bannon, Appellants, v. The People of the State of Illinois, at the Relation of Birel Milburn, Ella Myers and Grace Witty, Appellees.

Appeal from Circuit Court of Edgar County.

APRIL TERM, A. D. 1933.

272 I.A. 631

Gen. No. 8764. **Agenda No. 22.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

In this case a judgment of ouster was entered in the Circuit Court of Edgar County against the appellants, Joseph Haase, Frank E. Morrison and Henry F. O'Bannon, as Commissioners of the City of Paris. The proceeding was commenced by the State's Attorney of Edgar County, who filed a petition in quo warranto, on the relation of Birel Milburn, Ella Myers and Grace Witty for leave to file the information which leave was granted by the court. The main error, which is assigned on appeal and argued by counsel relates to the legal propriety of granting the leave to file the information, based on the averments contained in the petition. The errors assigned are as follows:

The court erred in overruling objections of appellants to petition for leave to file Information in nature of Quo Warranto.

The court erred in overruling motion of appellants to set aside order granting leave to file Information in Quo Warranto and to strike petition from the files.

The court erred in refusing to dismiss the Petition in Quo Warranto

On examination of the Abstract, however, it appears, that the petition is not abstracted. It is therefore evident, that this Court to review the Court's action in reference to the petition cannot intelligently consider and determine the same without an abstract of the material averments of the petition. The abstract does not therefore comply with the rules of this court. Rule 4 expressly provides: "That in all cases the party bringing a cause into this Court shall furnish a complete abstract of the record therein, referring to the appropriate pages of the record by numerals on the margin."

Under these circumstances the judgment of the trial court should be affirmed.

Bedinger v. *May*, 323 Ill., 187;
People v. *Southern Gem Co.*, 332 Ill., 370;
Village of Crotty v. *Domm*, 338 Ill., 228;
Deterding v. *Central Ill. Pub. Serv. Co.*, 223 Ill. Ap., 374.

The judgment is therefore affirmed.

Judgment affirmed.

(Two pages in original opinion.)

PUBLISHED IN ABSTRACT

33

H. H. Messick, Appellee, v. J. W. Hutton, Appellant.

Appeal from Circuit Court of Macon County.

272 I.A. 632

APRIL TERM, A. D. 1933.

Gen. No. 8767. **Agenda No. 25.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

In this case the appellee, H. H. Messick, as alleged holder in due course by assignment of a judgment note had a judgment entered against the appellant, J. W. Hutton, for the sum of $651.11 in the Circuit Court of Macon County under the warrant of attorney attached to the note which had been executed by the appellant. The appellant afterwards at the same term at which the judgment was entered made a motion to have the judgment opened, and to be allowed to plead in defense; and the motion was allowed by the Court. Afterwards the appellee, by leave of Court, amended his declaration: the amendment being as follows:

> "A conditional sales contract executed by the defendant as purchaser and the payee in said note as seller as a part of the same transaction, wherein said note was executed, provided that said defendant should make the payments as provided by said note, and upon failure to make said payments when due, seller at his option might declare said sum remaining unpaid immediately due and payable; and payments due May 15, 1930, and June 15, 1930, were not made; and plaintiff by assignment on April 16, 1930, took said conditional sales contract from seller and by terms thereof, its terms and conditions inured to the benefit of the seller, and the personal representatives and assigns of the seller, and the assignee of the seller should be entitled to all the rights of the seller, and the plaintiff as such assignee, on June 20, 1930, elected to declare the entire sum remaining unpaid to be immeditely due and payable."

The appellant pleaded the general issue; also, pleaded a second plea alleging, that the appellant "did not make and deliver the promissory note and the conditional sales contract in the amended declaration mentioned." A third plea was filed by the appellant alleging "that the said note and conditional sales contract, were made and entered into without a good and valuable consideration; and, that the appellee did not

purchase said note in good faith and for value." A fourth plea filed by the appellant alleges, that the said note and conditional sales contract, were never delivered; and that the same were executed at the request of the agent of the Turner Motor Sales Company with the understanding, that they were merely an order; and that they were not to become operative or effective or binding on the appellant until certain real estate transactions in which appellant was engaged, were closed; and that until such time, no automobile should be delivered or accepted by the appellant; and that the appellant did not close such real estate transactions; and notified said Turner Motor Sales Company by written notice, on May 8, 1930, and that therefore the said note did not become binding or effective; that said Turner Motor Sales Company wrongfully and fraudulently reported the transfer of said note and conditional sales contract to the appellee; and that the appellee at the time of the alleged transfer acknowledged that the same had never been delivered; and further averred, that the appellee did not purchase said note in good faith and for value. Appellant's fifth plea alleges, that the appellee did not elect to declare the entire sum unpaid on said note, to be due immediately and payable, pursuant to the said conditional sales contract. Appellant's sixth plea alleges;

That said conditional sales contract provided that title to said automobile should not pass to defendant until all installments of said note were paid, and until said time said automobile should remain the property of the seller; that if defendant should fail to make said payments the seller at his option might (1) elect to sue for the amount due, or (2) seller might take possession of said chattel and thereafter hold it free from all claims of the defendant and retain all payments made by defendant; that the assignee of the seller should be entitled to all rights of seller under said contract; and avers that on June 15, 1930, the plaintiff did seize and take possession of said automobile and appropriate same to his own use, and elect to rescind and disaffirm any provision in said note and contract obligating defendant to make further payments.

A seventh plea filed by appellant alleges, that after the time said promises are alleged to have been made, and before the commencement of this suit, to-wit, July 2, 1930, there was paid to the plaintiff for the use of the defendant a large sum of money, to-wit, the amount of all sums of money in said amended declaration mentioned, in full satisfaction and discharge of the said several alleged promises.

No question was raised in the trial court concerning the legal sufficiency of the special pleas, but issues

were joined thereon and the cause proceeded to trial; and at the conclusion of all the evidence in the case, the appellee made a motion, that the Court direct a verdict to find the issues in favor of the appellee, which was done. Thereafter the appellant made a motion for a new trial, and in arrest of judgment, which motions were denied by the Court; and the Court thereupon entered judgment upon the verdict; and that the judgment stand in full force and effect as of the time of the rendition thereof. This appeal is prosecuted from the judgment.

The main question raised for reversal of the judgment is, the legal propriety of the action of the Court in directing the verdict. An examination of the evidence in the record discloses, that there is no evidence to sustain the matters alleged as a defense in appellant's special pleas; but that the evidence clearly established appellee's right to the judgment for the amount for which it was originally entered. The evidence shows, that the appellee legally acquired the judgment note in question and the warrant of attorney attached thereto, by a valid assignment; and that he was the holder thereof in due course and for value, as well as the holder of the conditional sales contract. We find no errors in the record, with reference to the rulings of the court in the admission, or rejection, of the evidence offered by the appellant. For the reasons stated, we conclude, that the Court properly directed the verdict in favor of the appellee; and the judgment is therefore affirmed.

Judgment affirmed.

(Four pages in original opinion.)

October

A

PUBLISHED IN ABSTRACT

311

Arthur H. Gottschalk, Trustee in Bankruptcy for Davis, Smith & McAnulty, Inc., Bankrupt, Appellant, v. J. F. Leonard, Appellee.

Appeal from Circuit Court of Sangamon County.

APRIL TERM, A. D. 1933.

272 I.A. 632

Gen. No. 8773. **Agenda No. 31.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

This suit was commenced in the Circuit Court of Sangamon County by Davis, Smith & McAnulty, (a Corporation), against the Appellee, J. F. Leonard, to recover the sum of $3,714.20, which it claimed was due on a promissory note executed by the appellee and delivered to the Plaintiff in due course of a business transaction. After the suit was brought, the appellant, Arthur H. Gottschalk, as trustee in bankruptcy, was substituted as Plaintiff in the case, for Davis, Smith & McAnulty, the insolvent corporation; the corporation having become insolvent after the commencement of the suit. The defense in the suit to the plaintiff's right of recovery centered in a verified plea filed by the appellee on leave of Court during the trial of the case, which averred, that the consideration of the note in controversy was for a gaming transaction carried on by the parties. The trial of the case resulted in a verdict of the jury, finding the issues for the appellee; and the Court rendered judgment upon the virdict of the jury. The appeal is prosecuted to reverse this judgment: and it is contended upon appeal, that the verdict of the jury is manifestly against the weight of the evidence on the material controverted question in the case raised by the appellant's plea, that is to say, whether or not the transactions were gambling transactions.

Upon consideration of the evidence in the record, we find, that while it is true as asserted by appellant, that the question of whether or not the transactions were gambling transactions rested almost entirely on the evidence of the appellee; nevertheless, there are many circumstances in the evidence, which apparently corroborated the appellee in his testimony as to the nature of the transactions in controversy; and the jury were fully warranted in believing that the appellee's testimony was the true version of the matter. It is

the peculiar province of a jury to determine the weight of the evidence; and they determined the contested matter in this case against the contention of the appellant. We conclude therefore, and under these circumstances that this Court would not be justified in holding, that the jury by the verdict should not have found in favor of the appellee from the evidence; but should have found in accordance with the contentions of the appellant. We do not find any reversible error in the record and the judgment is therefore affirmed.

(Two pages in original opinion.)

Oct. 13, 1932 - Opinion filed
Jan. 4, 1934 - Rehearing denied

PUBLISHED IN ABSTRACT

357

Isabelle W. Shumway, Appellant, v. Hiram M. Shumway and Dorice D. Shumway, Appellees.

Appeal from Circuit Court of Christian County.

272 I.A. 632

APRIL TERM, A. D. 1933.

Gen. No. 8778. **Agenda No. 35.**

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

In this case a judgment by confession was entered in the Circuit Court of Christian County on January 10, 1930, in vacation, for the sum of $12,238.52 against the appellee, Hiram M. Shumway and Dorice D Shumway, individually. The Appellees claim, that they had executed the promissory notes, five in number, together with the powers of attorney attached thereto, as Executors of the D. D. Shumway Estate. After the entry of the judgment, the appellees appeared in court at the term following; and craved oyer of the notes upon which the judgment was rendered; and also filed a general and special demurrer to the declaration which demurrer was sustained by the court. This appeal is prosecuted from the judgment sustaining the demurrer.

A copy of the notes and the signatures attached thereto; and of the endorsements, are not set forth in the Abstract. Rule 4 of this Court provides: "That in all cases the party bringing a cause into this Court shall furnish a complete abstract of the record therein, referring to the appropriate pages of the record by numerals on the margin." It is apparent from the provisions of the rule, that it is not complied with by the Abstract; and that the Court could not intelligently review the action of the Court in passing on the general and special demurrer, which the Abstract does not set forth, without having before it the averments of the general and special demurrer and a copy of the notes and the signatures attached thereto; and the endorsements thereon, to determine the legal correctness of the ruling of the Court on the demurrer.

Under these circumstances, the judgment should be affirmed.

Bedinger v. *May*, 323 Ill. 187;
People v. *Southern Gem Co.*, 332 Ill. 370;
Village of Crotty v. *Domm*, 338 Ill. 228.
Deterding v. *Central Ill. Pub. Serv. Co.*, 223 Ill. *Ap.*, 374.

The judgment is therefore affirmed.

Judgment Affirmed.

(Two pages in original opinion.)

PUBLISHED IN ABSTRACT

Martha Ferguson, Appellant, v. Clarence Ferguson, Appellee.

Appeal from Circuit Court of McLean County.

OCTOBER TERM, A. D. 1932.

Gen. No. 8697. **Agenda No. 39.**

MR. JUSTICE DAVIS delivered the opinion of the court.

Martha Ferguson brought a suit in the circuit court of McLean county against her husband, Clarence H. Ferguson, for divorce upon the ground of extreme and repeated cruelty. He answered, denying the charges of the bill.

The issue was submitted to a jury for trial, which returned a verdict in favor of the defendant, and the court entered a decree dismissing the bill of complaint for want of equity.

The parties were married on September 15, 1906, and lived together practically all of the time until the commencement of this suit, and were the owners of their home in Normal, Illinois. They have two children, a son, Maurice, and a daughter, Harriet Ferguson, aged 18 years, neither of whom were living at home.

At the time of their marriage the husband was employed by the United States government as a railway mail clerk, and was so employed at the time of the trial of this cause.

The complainant filed a petition for the allowance of temporary alimony and solicitor's fees, and upon the hearing thereon at the November, 1931, term of said court an order was entered requiring the defendant to pay the sum of $30.00 per month, temporary alimony, pending the litigation, the payments to commence on the 14th day of November, 1931, and the sum of $50.00 for solicitor's fees, payable forthwith.

After the denial by the court of her motion for a new trial the complainant presented to the court for hearing a petition alleging that she had on the 11th day of November, 1931, petitioned the court, praying that the defendant be compelled to make proper and suitable provision for alimony, pendente lite, and an allowance of a suitable sum to enable her to employ counsel to prosecute her suit; that, on May 12, 1932, a trial was had and that complainant's solicitor prepared the original bill for divorce and petition for

alimony, and tried said cause before a jury, and moved for a new trial and argued the motion thereon, and had taken an order for appeal, and that the sum of $30.00 per month was insufficient and inadequate to provide for the complainant; and praying that the defendant be required to pay complainant a more reasonable sum for her support and maintenance during the pendency of her suit, and such sums of money as may be necessary to enable her to carry on her suit, and to pay her solicitor's fees for services already performed, court costs, the filing fee in the Appellate Court and the expense of preparing the record for appeal.

The court denied the prayer of her petition, and refused to enter an order making any allowance to the complainant.

Appellant complains that the court, by its order entered at the November, 1931, term of said court, unduly limited the amount of temporary alimony and solicitor's fees, and that such action amounted to an abuse of the discretion of the court. At the time of the entry of this order no complaint was made by appellant as to the sufficiency of the allowance, and no appeal was prayed from such order; and no action was ever taken by complainant for any modification of said order or for an increase in the amount allowed for temporary alimony and solicitor's fees prior to the trial of said cause. The order required the defendant to pay solicitor's fees and temporary alimony during the pendency of the suit, and was a final order in the sense that it was appealable. *Cutler* v. *Cutler,* 88 Ill. App. 464. An appeal is purely a statutory right, and must be exercised in accordance with the provisions of the Statute. *Anderson* v. *Steger,* 173 Ill. 112.

A decree, which finally fixes the rights of the parties, must be appealed from within the time allowed by the Statute, and is not subject to review from a later decree not involving such rights. *Drummer Creek Drainage District* v. *Roth, et al.,* 244 Ill. 68.

This appeal is from the order of the court denying the prayer of the petition of the appellant for a more reasonable sum for her support and maintenance during the pendency of her suit on appeal and from the decree of the court dismissing her bill of complaint for want of equity.

The order and decree appealed from did not in any way involve the rights of the parties, as fixed by the order entered at the November, 1931, term of said court; and for that reason that order is not subject to review upon this appeal.

The petition of the appellant for a more reasonable sum for her support and maintenance, during the pendency of her suit on appeal and the expenses incident

thereto, was properly denied by the court. Her cause had been tried by a jury and a verdict rendered in favor of the defendant, and an appeal had been prayed from the decree of the court dismissing her bill of complaint for want of equity.

When a wife takes an appeal from a decree in favor of the husband, in divorce cases, the court is without authority to enter an order requiring the husband to pay alimony during the pendency of such appeal. *Cahill* Ill. Rev. St., Chap. 40, Sec. 16; *Thomas* v. *Thomas,* 233 Ill. App. 488. Neither did the court err in denying the prayer of complainant's petition for an allowance with which to pay her solicitor for services performed prior to the filing thereof.

Appellant contends that the verdict of the jury was against the preponderance of the evidence, and that the court erred in denying her motion for a new trial.

She testified that her husband had been guilty of eight acts of personal violence towards her during a period of twenty years. Her testimony was confined to answers to questions, calling attention to a particular time or occurrence; and in the answers given by her no facts or circumstances were narrated attendant upon or surrounding such attacks.

She testified that no one other than her daughter, Harriet, was present on any of these occurrences, except two, on August 23 and September 5, 1931, when Mrs. Hunt and Mrs. Schoupe came into their house and saw her husband in the act of striking her. She also testified that her husband got drunk, was quarrelsome and failed to support her; and that there were black and blue marks on her body after her husband struck her.

Mrs. Hunt and Mrs. Schoupe testified that they went to call at the Ferguson home on two occasions, August 23 and September 5, 1931, and that on both occasions, when they walked into the house, they saw Mr. Ferguson striking his wife; and Mrs. Schoupe also testified that on July 19, 1931, she saw black and blue marks on the arm, chest and legs of Mrs. Ferguson, this being one of the days Mrs. Ferguson testified her husband struck and beat her.

One of the witnesses testified that, on or about July 19, 1931, she visited the Ferguson home and saw black and blue spots on the arms and neck of Mrs. Ferguson.

Appellee denied that he ever struck or beat his wife, and denied specifically all of the charges testified to by her; and also denied that he failed to support her; and that he did not remember Mrs. Hunt or Mrs. Schoupe being at their house on either August 23 or September 5, 1931, and denied that he ever struck or beat his wife in their presence. He testified that he had not laid his hands on her except when he had to repel her, and never in an offensive way to strike her.

He testified that his wife had black and blue marks on her many times; that they were from various causes, when she got bumped, or when Dr. Casner took blood tests from her ear it became black for two weeks; that the least little thing would discolor her; that he never hit her to make any black and blue marks on her.

The daughter, Harriet, testified on behalf of her father that she heard the testimony of her mother, that she never saw her father strike her mother during all of the time she lived with her parents; that on the occasion, testified to by her mother, when she charged that her husband had hit her in the jaw and jerked her apron off, and threw beans she was picking, all over the garden, her father took hold of her mother's apron and that her mother jerked away, but that he did not strike her; that her mother was not at home on September 5, 1931, and that Mrs. Hunt or Mrs. Schoupe were not at their house on the evening of that day.

After a careful consideration of all of the evidence we find that there is no corroboration of any of the charges of personal violence, except in two instances, and as to one of these the witnesses are contradicted by both the appellee and his daughter. The testimony of Mrs. Hunt and Mrs. Schoupe corroborated appellant in her charge that her husband beat and struck her on August 23, 1931, and was uncontradicted except by appellee.

With the above exception the evidence as to the alleged acts of violence is that of appellant, and appellee denies her charge and is corroborated to a large extent by their daughter.

There should be evidence of such acts as would constitute sufficient cause for divorce, under the circumstances, in addition to the evidence of the party to the suit who makes the charges, when such acts are denied. *Whitlock* v. *Whitlock*, 268 Ill. 218.

In divorce proceedings the parties are entitled to a trial by a jury; and, upon all the issues affecting the right of the divorce, the verdict of the jury is not advisory merely but is binding upon the lower court, and consequently binding upon the Appellate Court to the extent it can not be set aside unless it is manifestly against the weight of the evidence. *Stafford* v. *Stafford*, 299 Ill. 438. We cannot say that the verdict is manifestly against the weight of the evidence.

Complaint is made that the court excluded competent evidence offered on behalf of the appellant; and particular attention is called to the evidence of the witness, A. J. Casner, who was asked, Sometime last fall, Doctor, didn't you have a conversation with the defendant, Clarence Ferguson, in which he asked you to testify for him to the effect that his wife was mentally

unbalanced? To which question an objection was sustained. Attention was also called to the evidence of the witness, Joseph W. DePew, who was asked, Did you have a conversation with Mr. Ferguson on one occasion when Mr. Ferguson inquired of you how he should proceed to have his wife adjudged mentally unbalanced? To which question an objection was sustained; and both witnesses were excused by appellant.

Appellant made no offer as to what she expected to prove by these witnesses, or no statement to the court as to what she expected the witnesses would answer; and, in the absence of such offer, the trial court could not pass upon the relevancy or materiality of the testimony excluded, nor can we determine that its exclusion was in any way prejudicial to appellant.

Complaint is also made that the court improperly restricted the cross-examination of the daughter, Harriet. We have examined the record at length, and find no error in the ruling of the court in that respect. Answers to the questions, to which objections were sustained, would not in any manner assist the jury in arriving at a proper verdict, and the only purpose would be to cast reflection upon the character of the witness.

No prejudicial error, either in the admission or the exclusion of evidence, was committed. We have examined the instructions complained of, and find the objections made to them are without merit. Finding no reversible error in the record in this case the decree of the circuit court is affirmed.

Affirmed.

(Seven pages in original opinion.)

PUBLISHED IN ABSTRACT

Guy R. Barrow, Appellant, v. Gertrude Phillips, Appellee.

Appeal from Circuit Court of Ford County.

OCTOBER TERM, A. D. 1932.

Gen. No. 8705. **Agenda No. 45.**

MR. JUSTICE DAVIS delivered the opinion of the court.

On September 27th, 1927, appellant obtained a judgment by confession against appellee for the sum of $4747.16, in the circuit court of Ford county.

On January 4th, 1928, a motion by appellee to open up said judgment and for leave to plead was denied, and an appeal taken to this court, the judgment of the circuit court was reversed and the cause remanded with directions to open up the judgment and grant leave to the defendant to plead to the merits. (250 Ill. App. 587.)

Upon reinstatement in the court below the common counts were added to the declaration by the plaintiff, and pleas were filed, and a jury empanelled to try said cause; and at the close of the plaintiff's evidence the defendant made a motion for a directed verdict, which was sustained by the court.

The record discloses, after reciting that at the close of the plaintiff's evidence the defendant moved the court to instruct the jury to find the issues for defendant, and tendered an instruction in writing to that effect, and that the court sustained said motion and instructed the jury to find the issues for the defendant, the following judgment:

"Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff his costs and charges in this behalf expended, and have execution therefor.

And now it is further ordered by the court that the judgment by confession heretofore rendered in this cause in vacation before the clerk of this court on the 27th day of September, 1927, in favor of the plaintiff and against the defendant for forty-seven hundred and forty-seven dollars and sixteen cents ($4747.16) be and the same is hereby vacated, set aside and for naught esteemed."

The appeal in this case was taken from this judgment, which is simply a judgment for costs and for the vacation of the original judgment, entered by confession, and not a final judgment. It should also have

provided, that "plaintiff take nothing by his suit and that defendant go hence without day." *Town of Magnolia* v. *Kays,* 200 Ill. App. 122.

The statute only authorizes final judgments and decrees to be reviewed by appeal or writ of error to this court, and the fact that neither party has raised any question as to the jurisdiction of this court to entertain the appeal, having submitted the cause on its merits, does not confer jurisdiction on this court to entertain the appeal, but the court of its own motion must dismiss the same. *Chicago Portrait Co.* v. *Chicago Crayon Co.,* 217 Ill. 200; *County of Franklin* v. *Blake,* 257 id. 354; *Williams* v. *Huey,* 263 id. 275; *Trebbin* v. *Thoeresz,* 316 id. 30.

Appellant having taken the appeal from a judgment which was not final, and for that reason not reviewable by this court, must pay all the costs occasioned thereby.

The appeal must, therefore, be dismissed.

Appeal dismissed.

(Two pages in original opinion.)

PUBLISHED IN ABSTRACT

Marshall Nichols, Administrator of the Estate of Mildred Nichols, Deceased, Defendant in Error, v. Earl Traughber, Plaintiff in Error.

Error to Circuit Court of Christian County.

JANUARY TERM, A. D. 1933.

272 I.A. 633

Gen. No. 8734. **Agenda No. 15.**

MR. JUSTICE DAVIS delivered the opinion of the court.

Defendant in error recovered a judgment of $3000.00 against plaintiff in error in an action of trespass on the case, in the circuit court of Christian county, to reverse which this writ of error is prosecuted.

The declaration contains four counts, to which the general issue was pleaded. The first count charged general negligence in the operation of an automobile, then controlled and operated by plaintiff in error on a public highway at a point about one mile west of Moweaqua, Illinois, and that by means of such negligence of the plaintiff in error, and as a direct proximate result and in consequence thereof, said automobile ran upon and struck Mildred Nichols, who was then upon said highway and in the exercise of due care and caution for her own safety, with great force and violence, and, as a direct result thereof, she afterwards, on December 2, 1931, died; that she left her surviving Marshall Nichols, her husband, and Morris, Helen, Gertrude, Lloyd, Norma, Keith, Betty and Marshall Nichols Jr., her children and next of kin, etc.

The second count charges that the plaintiff in error so carelessly and negligently drove said automobile at a high, dangerous and excessive rate of speed, of, to-wit, fifty miles per hour, in violation of the Statue; that, by means of the premises, it ran upon and against said Mildred Nichols while she was in the exercise of ordinary care for her own safety, whereby she died, etc.

The third count charges that the plaintiff in error, with a conscious indifference to surrounding circumstances and conditions, and conscious of his conduct, then and there willfully and wantonly ran said automobile against said Mildred Nichols with the result that she was killed, etc.

The fourth count charges that defendant ran his automobile without giving any warning and without stopping the same until he could safely proceed along said highway, etc.

Marshall Nichols, who sues as administrator of the estate of the deceased, was the husband of Mildred Nichols, and lived with his family a mile and one-half west and half a mile north of the village of Moweaqua. On the evening of October 31, 1931, he, together with his wife, the deceased, and seven children, started for Moweaqua in an Overland automobile, and when he reached a point about one-half of a mile west of the village the motor stopped on account of a lack of gasoline. At this point the road dipped slightly downward; at the bottom of this decline, and about ninety-five yards from the crest of the hill, was located a culvert. He allowed his car to coast down the hill to a point a few feet west of this culvert and stopped the car at the side of the road, which at this point was about seven feet below the level of the crest of the hill. Nichols then proceeded on foot eastward to a house and telephoned a garage in Moweaqua, owned by the witness Riley, to send out to him some gasoline.

Riley took the gasoline in a Ford coupe out to the place Nichols' car was stalled, and parked it on the north side of the road, facing westerly and a little diagonally up the hill and at a point, estimated by the witnesses, to be from ten to fifty feet west of the Nichols car. He left the headlights on the coupe burning, and though he testified that were dimmed, all the other witnesses who testified on the subject said that were so bright that they blinded the drivers of the cars coming down the incline from the west.

After Riley parked his car, he took his can of gasoline and proceeded to pour the same into the tank on the rear of the Nichols car and, while doing so, another car came from the west, driven by Arthur Watson, which hit the Nichols car, swerved over to the left and tipped over across the highway. After this happened Mrs. Nichols, who had been sitting in their car, got out and went over to the Watson car, and shortly thereafter a third car, driven by Earl Traughber, the plaintiff in error, came from the west down this incline at a speed of forty-five miles per hour, and also hit the Nichols car, skidded to the left and ran into the Watson car which was lying on its side, and in doing so, struck Mrs. Nichols who had returned to the Nichols car and was standing by its side with her hand on the door. She was thrown to the ground, but shortly after that arose and got into the car. She was subsequently taken to a hospital where she remained until December 2, when she died.

In the Watson car beside Arthur Watson, the driver, were his sister, Jessie, and Virgil and Thelma Staples, all of whom testified that the lights from the Riley car, as they came down the hill, were so blinding that the Nichols car was invisible until they were practically upon it.

In the car of the plaintiff in error besides himself were his sister, Geraldine, his cousin, Beulah Traughber, Bernice Lucas and Roy Anderson. They all testified that the lights from the Riley car blinded them so that neither the Nichols car nor the Watson car could be seen by them as they came down the hill.

At the close of the evidence for the plaintiff, and again at the close of all the evidence, a motion was made on behalf of the defendant to direct a verdict of not guilty as to the third count of the declaration, which charged willfull and wanton conduct in the management and control of the automobile; but the motions were overruled, and the case went to the jury with the issue of willfulness and wantonness submitted to them by the instructions of the court.

We find that the evidence fails to sustain the charge that the plaintiff in error willfully and wantonly injured the said Mildred Nichols, as alleged in the third count of plaintiff's declaration.

In the case of *Grinestaff v. N .Y. Central R. R.*, 253 Ill., App. 589, this court held that where the declaration contains counts based on negligence and also on willfulness, and there is no evidence to support the count charging willfulness and the verdict is general on all counts, the judgment must be reversed because the injury could not have been caused negligently and willfully at the same time, and the court could not know on which of the counts the jury based its verdict Willfulness may embrace punitive damages which are not recoverable in actions for negligence.

The Grinestaff case has been followed by this court in *O'Neall v. Blair*, 261 *Ill. App.* 470, and *Robbins v. Ill. P. and L. Corp.*, 255 *id.* 106, and also by the Appellate Court of the second District in the case of *Streeter, Admr., v. Humrichouse*, 261 *Ill. App.* 556. A full discussion of the rule is set out in these cases, and notwithstanding that a contrary rule has been announced by the Appellate Court of the First District, in the case of *Price v. Bailey*, 265 *Ill. App.* 358, we still adhere to the rule as announced in our former decisions.

All of the instructions given on behalf of plaintiff, relating to the questions of due care, limit such due care to the deceased. The declaration contained no averment of the exercise of due care on the part of the husband or of any of the beneficiaries, and was for that reason demurrable, *Holden v. Schley*, 271 *Ill. App.* 159.

If any of the beneficiaries were guilty of any contributory negligence the plaintiff could not recover. *Hazel, Admr.*, v. *H-D Bus Co.*, 310 *Ill.* 38; *Rost, Admr., v. Noble & Co.*, 316 *id.* 357. These instructions should not have been given by the court.

The judgment of the circuit court must be reversed and the cause remanded; and, for that reason, it is not necessary for the court to pass upon the question as to whether the evidence is sufficient to sustain a verdict of guilty as to those counts in the declaration charging negligence on the part of plaintiff in error.

The judgment of the circuit court is reversed and the cause remanded.

Reversed and Remanded.

(Five pages in original opinion.)

PUBLISHED IN ABSTRACT

39

A

Anna G. Whipple, Defendant in Error, v. William L. Harris, Doing Business as "Community Bakery," Plaintiff in Error.

272 I.A. 633

Error to Circuit Court of Sangamon County.
APRIL TERM, A. D. 1933.

Gen. No. 8747. **Agenda No. 6.**

MR. JUSTICE DAVIS delivered the opinion of the court.

The defendant in error recovered a judgment against the plaintiff in error in the sum of $250.00 as damages for personal injuries received by her through the alleged negligence of plaintiff in error

The declaration as amended consists of two counts, in the first of which it alleged in substance that, on December 24, 1931, the defendant was conducting a certain store and bakery in the city of Springfield, at which certain foods were baked and offered for sale to the general public to whom there was an implied invitation to enter said building for the purchase of said foods and to arrange for the baking thereof; that it was the duty of the defendant to keep said building in a reasonably safe condition so that all persons, who should enter for the purpose of buying or ordering said foods, and who should be in the exercise of ordinary care for their own safety, should not be injured because said building was not kept in a reasonable safe condition by reason of the negligence of the defendant in that behalf; that there was in such bakery a certain opening and stairway leading to the basement thereof, which said stairway and opening was unguarded and had no railing of any sort around it; that it was the duty of defendant to exercise reasonable care for the safety of the plaintiff while on the premises, but that defendant disregarded his duty in that behalf so that while the plaintiff while talking to the defendant in the transaction of business and without knowledge of said opening and stairs, she, while in the exercise of due care, backed into said opening and was thrown with force and violence down said stairs, whereby she was injured, etc.

The second count contains substantially all the averments set out in the first, and in addition thereto, the allegation that defendant in his advertisements invited the public to inspect said bakery.

The front part of the building is the store proper where the goods of defendant are exposed for sale.

Behind this room is an icing room where cakes are iced, and to the rear of the icing room is the oven room where the baking is done. The stairway in question leads down to the basement of the building from the icing room.

It appears from the testimony that there was a built-up wall or partition three and one-half feet high along two sides of the opening, and the side of the building protected the third side, so that only the entrance to the stairs was unguarded. The accident happened about eight o'clock in the morning, and the plaintiff had gone to the bakery to see the defendant about making certain cakes for her. She arrived there shortly after seven o'clock, and the defendant not having arrived at that time, she spent some time looking around the building and passed through the icing room several times.

The room was lighted by two large windows located in front of the stairway, and by an electric light of 100 watt power directly over the stairway opening which was lighted at the time. Appellee herself testified that the room was lighted and that she had good eyesight. When the defendant came to the bakery she went into the icing room where she was to talk to him about the cakes she wished baked. The defendant and an employee were conversing near the opening to this stairway and the plaintiff, in attempting to pass behind them, stepped into the stairway and fell down the steps.

This room was well lighted, the plaintiff's eyesight was good, and she was not feeble or infirm. She had been in the icing room at least once before that morning and had had to pass near the entrance to the stairway and, according to the testimony of the witnesses for defendant, had passed it several times prior to the accident, and the opening thereto was in full view.

The facts in this case are clearly distinguishable from those cases which hold that it is negligence on the part of the occupier or owner of premises to permit open elevator shafts and stairways to remain unguarded in places which are dark and where an invitee has a right to be. To hold that defendant was negligent in not guarding the opening to this stairway, under the facts in this case, would be to announce a rule that every occupier of a building would have to maintain a gate or other barrier at the head of every stairway leading from one floor to another or be liable in damages to any invitee, visitor or customer who might inadvertently step into the stairway and fall. No case has been brought to the attention of the court, announcing such a rule of law.

The judgment of the circuit court is reversed; and the clerk is directed to incorporate therein the following finding of fact:

The court finds as a fact, from the evidence, that the defendant was not guilty of negligence in manner and form as charged in the declaration.

Judgment reversed.

(Three pages in original opinion.)

PUBLISHED IN ABSTRACT 40 A

Russell Satterfield, a Minor, by S. J. Satterfield, His Next Friend, Appellee, v. Harley Freeman, Appellant.

Appeal from the Circuit Court of McLean County.

APRIL TERM, A. D. 1933. 272 I.A. 633[4]

Gen. No. 8754. **Agenda No. 12.**

MR. JUSTICE DAVIS delivered the opinion of the court.

Russell Satterfield, a minor, by his next friend, recovered a judgment against appellant in the circuit court of McLean county for the sum of $5,000.00, as damages for personal injuries received by him as the result of an automobile accident.

The declaration consists of three counts, all of which charge general negligence. This accident occurred at the intersection of Division and East streets; Division street running east and west and being the dividing street between the cities of Bloomington and Normal; and East street extending north and south through Bloomington to Division street, and from thence north as University street through Normal.

Appellant was sixteen years of age and attending Normal Community High School and, in the afternoon of November 11, 1931, attended a foot ball game in Normal between a team of the Normal Community High School and another high school. It had been raining and misting during the day, and at the time of the accident the streets were wet and slippery.

Clinton Thomas owned a Ford Tudor sedan, which was parked near the football field, and at the conclusion of the game four girls and the driver, Clinton Thomas, got into the car, three of the girls in the back seat and one in the front seat with the driver; two boys stood on the running board on the right side of the car, and appellee stood on the running board on the left side. The window in the door on the left side of the car was down a few inches, and appellee testified that he stood just behind the post between the windows with his left hand through the first window, holding onto the top of the door of the car, with his right hand resting on the top of the car, and facing north as the car proceeded west as they left the football field. It was raining hard at that time; as the car approached the intersection it slowed down from a speed of twenty miles an hour to between twelve and fifteen miles per hour just as it entered the intersection, and

appellee testified that at that time he was facing west and looked towards the left and saw no car approaching, but that when the car was about half way across the intersection he again looked and saw appellant's car coming straight towards them and about eight feet away and on the left hand side of East Street; that appellant's car struck the left front of Thomas' car and he was thrown over the left front fender and part of the radiator onto the pavement. He was quite severely injured, and one of his kidneys had to be removed. Appellant was driving his car, and sat alone in the front seat; and with him in the car were his daughter, 13 years old, his son, 12 years old, and a girl, 13 years old, who were all seated in the back seat of the car. He testified that he was driving north on the east side of East street at about 25 to 30 miles per hour, and when he first saw Thomas' car he was about 60 or 70 feet south of the intersection and saw appellee standing on the running board, and that the Thomas car was 60 or 70 feet from the intersection; that when he saw there was going to be a collision he applied his brakes and attempted to turn west on Division street, and the front bumper of his car hit Thomas' car and the rear end swung around and hit it.

According to the testimony of appellant the cars were about the same distance from the intersection when he first saw Thomas' car and were traveling at about the same rate of speed, and under these conditions it became the duty of appellant under the law to give Thomas' car the right of way. Both appellant and appellee were corroborated to some extent by the occupants of the respective cars. There was evidence that appellant, when approaching the intersection, had been driving near the center and towards the west side of the street. It was the duty of the jury to determine from all of the evidence whether appellant was guilty of negligence which caused the injury to appellee.

It is contended that, even though it be conceded, that appellant was guilty of negligence, yet the evidence conclusively shows that appellee was guilty of contributory negligence and for that reason cannot recover. When one is a guest of a driver of an automobile and riding with him he must exercise due care for his own safety, and when he has an opportunity to learn of approaching danger and avoid it, it is the duty, in the exercise of ordinary care for his own safety, to warn the driver of such danger. *Pienta* v. *Chicago City Ry. Co.*, 284 *Ill.*, 246; *Opp* v. *Pryor*, 294 *Ill.*, 538; *Dee* v. *City of Peru*, 343 *Ill.*, 36.

Appellee testified that when they were about to enter the intersection he looked south and saw no car, and

that he stood back of the window by the side of the driver so that his view would not be obstructed. Thomas testified that appellee's position on the running board did not obstruct his view to the south, and that he looked in that direction as he entered the intersection and did not see appellant's car until his own car was half way over the center line of the street.

Under the facts as they appear the question of contributory negligence was properly left to the jury, especially in view of the instructions given on the theory of the law adopted by each party on the trial. Appellee was 16 years of age when he was injured. There was offered, and the court gave on behalf of both appellant and appellee instructions stating the rule of law to be that ordinary care as applied to appellee means that degree of care and caution that an ordinarily prudent boy of his own age, capacity, experience and intelligence, as shown by the evidence, would exercise under like circumstances and surroundings. They were erroneous, as the law has been settled for many years in this state that the rule is, that a child under seven years of age is regarded as a matter of law incapable of such conduct as would constitute contributory negligence; between the ages of seven and fourteen it is required to exercise such care as a child of its age, capacity, experience and intelligence might reasonably be expected to use under similar conditions; and after the age of fourteen, it is required to use the same degree of care as an adult person. *Walldren Exp. Co.* v. *Krug*, 291 *Ill.*, 472; *Austin* v. *Pub. Service Co.*, 299 *Ill.* 112; *Maskalinus* v. *C. & W. I. R. R. Co.*, 318 *Ill.*, 142; *McClaren* v *City of Gillespie*, 250 *Ill.*, *App.* 53.

Appellant, having induced the court to give erroneous instructions and the jury to act upon the theory embraced therein, cannot now complain that it was error to do so. *People* v. *Birger*, 329 *Ill.*, 352; *Schubert* v. *Patera*, 310 *Ill.*, 419; *S. V. Coal Co.* v. *Robizas*, 207 *Ill.*, 226; *B. & O. S. W. R. R. Co.* v. *Then*, 159 *Ill*, 535.

It was also contended that it was negligence per se to ride upon the running board of a moving automobile, and a number of authorities of other jurisdictions have been cited by counsel for appellant announcing this doctrine. On the other hand, as many have been cited by counsel for appellee, from other jurisdictions, holding the contrary view. This question has never come directly before the courts of this state for review and determination; however, from the reasoning advanced for rulings held in analogous cases in this state, in our opinion, it is doubtful if riding upon the running board of a moving automobile will be held to be negligence per se, but on the contrary such fact will

be made to depend upon the circumstances in each case, and we so hold in this case.

The seventh instruction given for appellee, in defining the measure of damages, stated: "And the jury have a right to, and they should take into consideration all of the facts and circumstances as proved by the evidence before them; bearing upon the nature and extent of plaintiff's physical injuries, if any, so far as the same is shown by the evidence; his suffering in body and in mind, if any, resulting from such physical injuries, and such future sufferings and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained, or will sustain, by reason of such injury; and may find for him such sum, as in the judgment of the jury under the evidence and instructions of the court in this case will be a fair compensation for the injuries that he has sustained, in so far as such damages and injuries, if any, are claimed and alleged in the declaration and are proven by the preponderance of the evidence."

The first criticism to this instruction is, it permitted a recovery for suffering in mind which might not have been the direct result of the injuries received. The instruction specifically limits such suffering to that which he suffered from his physical injury, and was proper in this regard. *Chicago City Ry. Co.* v. *Anderson,* 182 *Ill.,* 298; *Klatz* v. *Pfeffer,* 333 *Ill.,* 90; *Walsh* v. *Chicago City Ry. Co.,* 303 *Ill.,* 339.

The second criticism is, that it permitted the recovery for damages claimed in the declaration which included an inability to transact his business and affairs, and did not limit this item to a time after the plaintiff would have reached his majority.

Nothing is mentioned in the declaration about his inability to attend to his business, but the allegations therein are limited to the attending of his "affairs and duties." The instruction limits all damages to those proven by the evidence. The only evidence in regard to any earnings of appellee were brought out in the cross-examination by counsel for appellant in an effort to show that he was able to work to some extent notwithstanding his injury. There was no effort by appellee to prove any damages by a loss of earning powers. Moreover, it is held in*Chicago Screw Co.* v. *Weiss,* 203 *Ill.,* 536, that the prosecution of a suit in the name of a minor, by his father as next friend, is equivalent to a relinquishment by the father of his rights to claim the earnings from such minor. Further, no error has been assigned that the amount of the verdict was excessive.

Appellant offered an instruction, marked D. G. 2, which gave the definition of due care generally, but

did not limit its application to either party to the suit. Appellant had already offered an erroneous instruction defining due care, as applied to appellee, and the court modified instruction, D. G. 9, so that it applied to appellant only, he being an adult forty years of age. This instruction offered was in conflict with the other instruction on the erroneous theory of negligence attributable to appellee. The error in giving the erroneous instruction having been induced by appellant, he can not complain of the court's action. Appellant's refused instruction, D. R. 2, was covered by several others which were given. Appellant's refused instruction, D. R. 3, was in conflict with the erroneous theory on which the case was tried, advanced by appellant and appellee herein before discussed, and it was not error to refuse it. Appellant's refused instruction, D. R. 4, states that if the jury found from the evidence that there was room for the plaintiff to have ridden inside of the car and if he had done so he would not have suffered the injuries complained of, and that an ordinary prudent person of like age, experience, etc., would not have ridden on the running board, and that such acts of plaintiff contributed to the injury, then their verdict must be in favor of the defendant. This instruction was erroneous as it excluded all other facts and circumstances in evidence. The car was a small, five passenger, Model T Ford, and was loaded to capacity with four girls and the driver. Appellee was dressed in a football suit, which was muddy and wet. It may be true that he might have crowded into this car, yet it would have been pure conjecture and speculation on the part of the jury as to whether, if he had done so, he would not have been injured. The evidence showed that by the collision the car was tipped over, and some of the occupants thereof were injured to some extent.

Appellant's instruction, D. R. 6, stated the rule that the mere fact of the happening of the accident did not raise the presumption of negligence on the part of the defendant. This instruction simply stated an abstract proposition of law and its refusal is not reversible error.

Mrs. C. L. Keith, a witness for appellee, testified that before the accident she was driving her car north on East Street and was about one-half block back or south of appellant's car, and that she could not tell whether appellee was on the front or back of the car on which he was riding; that it was raining hard, and the street was quite slippery and wet; that she did not pay any attention to whether appellee was standing towards the front of the car by the driver's seat. She was then shown a paper, dated November 12, 1931, being the day after the accident, which she admitted bore

her signature. Her attention was then called to the statement in the paper: "The Satterfield boy was standing towards the front of the car by the driver's seat." As to this statement she testified: "I did not know the Satterfield boy; I couldn't have said that because I did not know the Satterfield boy." She said she knew who the boy was, after she was told.

The following questions and answers then appear in her testimony: Q. Was he standing on the left running board towards the front of the car? A. There was a boy standing on the left hand side. I didn't know whether he was at the front or back. Q. You made that statement at that time? A. No, the insurance man wrote that out; and I said I did not know where the boy was, and he told me. Q. You signed it? A. Yes, I signed it. I was so exicted I don't know whether I read it right.

She further testified that the paper might be in the same condition as when she signed it. No further evidence was offered in regard to the paper. When appellant offered it in evidence, an objection thereto was sustained. While appellant admitted that her signature was attached to the paper, yet she denied that she ever told the person presenting it to her that appellee was standing towards the front of the car by the driver's seat, and did not know such statement was in the paper. On the authority of *Belskis* v. *Dering Coal Co.,* 246 Ill., 62, in our opinion the court did not err in sustaining the objection.

Another exhibit was offered in evidence, bearing the signature of appellee, to which the court sustained an objection. This paper was also dated, November 12, 1931. Appellee admits signing the paper the morning after the accident, while he was in the hospital.

Dr. McCormick testified that he was called to treat appellee November 11th, the day of the accident, at the hospital; he was suffering from shock; his side was severely injured; was very pale and pulse was weak; that he gave him opiates to relieve the pain; he was in the hospital a month; he saw him November 12th, between eight and nine o'clock a. m., when he was more or less drowsy from the opiate, pulse was still weak, and he was passing free blood in his urine; that he was out of shock at that time, but he was still under the effects of the opiates and stimulants were still being given to him; that he would suffer pain if his opiates gave out; Dr. McCormick had Dr. McIntosh, of Bloomington, as counsel; we braced him up with stimulants, and operated about the tenth day after the accident; the kidney was split completely in half, the urine escaping into the fatty tissue; the ruptured kidney was removed.

Appellee testified that he was conscious part of the time on the morning and off and on all day on November 12; that he remembers signing a statement in reference to his position on the car as it went into the intersection, and that he thought the signature to the exhibit was his. No further testimony was given by him, on the subject of the statement, as the court sustained objections to all further questions apparently on the ground that a witness cannot be recalled, after testifying in chief, for the purpose of laying grounds for impeachment.

The paper was not offered in evidence at the time of the examination of the witness, but was offered at the conclusion of all the evidence, and when so offered the court had the benefit of the testimony of the physician as to appellee's mental condition on the morning of November 12, when the statement was signed, as affected by the opiates which had been given him. The physician was not cross-examined on the subject of appellee's mental condition at the time as to whether he could understandingly make a statement of the facts concerning the accident, and his testimony stands uncontradicted that he visited appellee two or three times every day while he was in the hospital; that on the 12th day of November appellee was more or less drowsy from the opiates which had been given to him, and was still under the effects thereof, and that he would suffer pain if the opiates gave out. No effort was made to prove that appellee signed the statement during a lucid interval, or that the paper was read to him or that he understood the contents thereof. In the absence of such proof, it was not error of the court to refuse the offered statement.

Before the trial, and out of the hearing of the jury, counsel for appellee requested that he be allowed to make some preliminary proof to the effect that appellant was a member of the Mutual Automobile Insurance Company, and that several members of the jury were also members, and that counsel representing appellant was retained and paid by said company. Therefore the court ordered appellant to make an affidavit stating the names of persons on the jury who were insured in said company. This affidavit was prepared and presented to the court and counsel for appellee, out of the hearing of the jury, and counsel for appellant stated that appellee had the right to challenge any such jurors. Accordingly such jurors were not called and examined. There was no publicity of the matter, and the panel of jurors had no knowledge thereof, and we can see no cause for complaint on the part of appellant; but, on the contrary, think the court took a very proper method of excluding such jurors as were interested in the insurance company, thus avoiding the

necessity of questioning them on their voir dire examination.

The claim is made in this connection that counsel for appellee persistently attempted to get the fact that appellant was insured before the jury. We can find no basis for this claim. The only evidence of the fact that appellant was insured was elicited by appellant's counsel on his examination of the witness, Mrs. Keith, in relation to the witness' statement, signed by her, as heretofore alluded to. Counsel for appellee asked one witness if he had been subpoenaed by the sheriff, and this is claimed to have been an attempt to get such information before the jury; but we cannot see the force of the contention.

Criticisms of counsel's argument to the jury are also presented, but we do not find that anything was said therein of such prejudicial nature as would warrant the reversal of the judgment.

The judgment of the circuit court is affirmed.

Affirmed.

(Ten pages in original opinion.)

PUBLISHED IN ABSTRACT

4/ 4

Pearl Rigdon, Appellee, v. Abraham Lincoln Life Insurance Company, a Corporation, Appellant.

Appeal from Circuit Court of Vermilion County.

APRIL TERM, A. D. 1933.

272 I.A. 633[5]

Gen. No. 8763. **Agenda No. 21.**

MR. JUSTICE DAVIS delivered the opinion of the court.

Appellee recovered a judgment for $500.00 against appellant in an action of assumpsit, based upon an accident insurance policy on the life of her husband, Albert Rigdon, in which she was the beneficiary in case of death.

The declaration consists of one count and contains the usual averments found in such actions. The only defense to the merits contended for on this appeal is the issue raised by the second plea to the effect that the death of plaintiff's intestate did not result independently and exclusively of all other causes, from bodily injury sustained during the life of the policy sued upon, solely through external violence and accidental means, in accordance with the terms of the policy.

The evidence for the plaintiff tends to show that the deceased at the time of his injury was about forty-four years of age, of good moral habits, industrious and sober and, as some of the witnesses testified, could do the work of two men. There is no evidence that he had had any physical ailment within a year of his death. There is some evidence that in prior years he had colds, grippe or influenza, and at one time pneumonia; but there is no evidence that any of these ailments left any deleterious effects on his physical condition.

On December 13, 1930, the insured together with several other men were baling shredded fodder for a farmer and he and Dennie Hackler had hauled a load of bales to a barn on a truck to be placed in the mow of the barn. Each bale weighed about 96 pounds. In unloading the bales Rigdon, the deceased, lifted them from the truck up onto a shelf built about six feet higher than the bottom of the truck, and Hackler took them from there and placed them in the mow. Rigdon was lifting the last bale of the load to place it upon the shelf, when he slipped and fell on account of the slickness of the floor of the truck, and the bale of fodder fell upon him. After getting out from under the bale he did no more work that day, but sat in an

automobile until about 5:00 o'clock in the evening. When he reached home he became ill, could not eat any supper ,and he was taken to town to see a doctor; but the doctor could not be found and he was brought back home and plaintiff attended him. The next day Dr. Hubbard examined him and had him taken to a hospital in Danville in an ambulance. He died January 1st, 1931. During all of the days of his illness he suffered intense pain in his abdomen.

Dr. Hubbard testified that when he first saw the assured at his home he appeared to be in pain and shock, and complaining of his stomach and back; that he treated him for about a week for syphilis. Two tests were made for this disease, one showed positive and the other negative. As there was no response to his treatment for syphilis he changed his diagnosis to intestinal and respiratory influenza and nephritis. He called into consultation Dr. Hooker who diagnosed the disease as typhoid fever ,and tests were made, some of which showed positive and some negative; that in his judgment the primary cause of his death was influenza, both respiratory and intestinal. Influenza is caused by the bacilli of the influenza and is sometimes complicated with the germ which cause pneumonia, and that you would hardly get a pure variety alone in any case. In answer to a hypothetical question, he testified that it is possible that the condition of the assured could have been caused by the injury. He stated that he made a certificate of death, giving the cause of death as respiratory and intestinal influenza and nephritis, and the contributory cause "injury to the back while baling straw." He further testified that nephritis is a lesion in the kidney from a poison in the body.

Dr. Hooker testified that he was called in consultation and found the assured very sick and complaining of excruciating pain in his abdomen, which was greatly extended; that he had high temperature and a fast pulse; that he changed his diagnosis from typhoid fever to intestinal influenza; that they both started out with one diagnosis and changed it; that he don't say that if the man had a violent blow or fall to his back, that it would not effect his power of resistence.

It is a matter of common knowledge that if a strong, healthy man falls on a hard surface and a heavy body falls on top of him, he might receive such internal injuries as would cause his death. If a person, shown to have been reasonably healthy, falls and thereafter died it may be reasonably presumed that he died from the effect of the accident, even though there are no outward marks of the injury. *Ry. Officials and Employees Acc. Assn.* v. *Coady,* 80 Ill. App., 563. Where a person receives a physical injury, which causes a disease from which he dies, the prime cause of death

is the injury and not the disease. *Strehlow* v. *Aetna Life Ins. Co.*, 183 Ill. App., 50; *U. S. Health & Acc. Ins. Co.* v. *Harvey,* 129 Ill. App, 104; *Coulter* v. *Trav. Protective Assn.,* 144 Ill. App., 255.

No autopsy was made in this case, and the testimony of the doctors is not of such character as to be conclusive as to what really caused the death of the assured. They admittedly made two mistaken diagnoses, and there is no proof that any bacilli of influenza were discovered by the tests, or otherwise. At least the evidence is such that it became a question of facts for the jury to determine as to what caused the death of the assured.

Appellant assigns as error the refusal of the court to admit in evidence the death certificate of Dr. Hubbard. Everything contained in the certificate was testified to by the doctor, and the error, if any, was harmless.

Appellant made a general objection to a hypothetical question put to Dr. Hubbard, which was overruled. This was not error. *Chgo. City Ry. Co.* v. *Foster,* 226 Ill., 288. Other rulings on the admission of evidence are criticised but, in our opinion without merit, as are also the criticisms to the given and refused instructions.

We find no reversible error in the record, and the judgment is affirmed.

(Four pages in original opinion.)

PUBLISHED IN ABSTRACT

42

The Wichita Flour Mills Co., a Corporation Trading under the name and style and description of The Willis-Norton Company, Appellant, v. Oscar Shawver, Appellee.

Appeal from Circuit Court of Clark County.

APRIL TERM, A. D. 1933.

272 I.A. 634

Gen. No. 8772. **Agenda No. 30.**

MR. JUSTICE DAVIS delivered the opinion of the court.

Appellant brought suit in assumpsit against appellee in the circuit court of Clark county to recover damages for a breach of contract. Upon the trial of said cause the jury returned a verdict in favor of appellee.

The record discloses that, after motions for a new trial and in arrest of judgment were overruled, the following judgment was rendered and entered of record by the clerk: "Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff, The Wichita Flour Mills Co., doing business under the name, style and description of the Willis-Norton Company, his costs in this behalf expended."

This was not a final judgment. Appeals from and writs of error to circuit courts can only be prosecuted from final judgments in common law cases, and for that reason this appeal must be dismissed for want of jurisdiction. *Chicago Portrait Co.* v. *Chicago Crayon Co.*, 217 Ill. 200.

It requires considerable experience on the part of a clerk to properly enter of record the judgments rendered by the court, and for that reason it is the duty of the attorney to see to it that the judgment rendered is properly entered of record by the clerk.

Appeal dismissed at costs of Appellant.

(Two pages in original opinion.)

PUBLISHED IN ABSTRACT

43

Oscar Nelson, Auditor of Public Accounts of the State of Illinois, Complainant, v. John B. Colegrove & Co., State Bank, et al., Defendants.

First National Bank of Chicago, a Corporation, Appellant, v. R. Digby Large, Receiver of the John B. Colegrove & Co., State Bank, Appellee.

Appeal from Circuit Court of Christian County.

APRIL TERM, A. D. 1933. 272 I.A. 634

Gen. No. 8776. **Agenda No. 34.**

MR. JUSTICE DAVIS delivered the opinion of the court.

The John B. Colegrove & Co. State Bank, was placed in the hands of a receiver by the Auditor of Public Accounts, at which time it was indebted to appellant, the First National Bank of Chicago, in the sum of $139,497.91, to secure the payment of which it had pledged certain collateral securities.

Appellant filed proof of its claim with the Receiver on November 8, 1929, for the full amount of the indebtedness due it, but had prior to that time realized from certain of said securities the sum of $3,820.75. After filing proof of its claim and before it was heard by the court, appellant collected an additional amount of $107,745.18 from the collateral, and at the time of the hearing there was due on said claim the sum of $36,254.82. The court allowed the claim in that amount.

From the total indebtedness due appellant there should have been deducted the sum of $3,820.75, the amount realized from the collateral security before the proof of claim was filed, and the claim allowed for the balance, and no deduction should have been made for the amounts realized from the collateral after the filing of the proof of claim. *Furness* v. *Union National Bank,* 147 Ill. 570; *Levy* v. *Chicago National Bank,* 158 Ill.88.

The questions arising in this case are discussed in the opinion of the court filed at the present term, in the case of *Bank of Commerce Liquidating Co.* v. *R. Digby Large, Receiver.*

The decree of the circuit court is reversed and the cause remanded with directions to allow the claim in the sum of $135,677.16.

Reversed and remanded with directions.

(Two pages in original opinion.)

PUBLISHED IN ABSTRACT

44

A

Vena Roberts, Defendant in Error, v. T. W. Doss, Plaintiff in Error.

Error to County Court of Moultrie County.

OCTOBER TERM, A. D. 1932.

272 I.A. 634

Gen. No. 8702. **Agenda No. 42.**

MR. JUSTICE FULTON delivered the opinion of the court.

Plaintiff in Error procured a judgment and execution against A. C. Roberts, husband of Defendant in Error, and others in Piatt County, Illinois, on December 14th, 1931. The Sheriff levied the execution on February 8, 1932, covering the property in question. Defendant in Error demanded a trial of the right of property and the Court found that the title to the property was in her and that she was entitled to possession as against Plaintiff in Error.

Defendant in Error claimed title by virtue of purchase and Bill of Sale from one Elmer Sentel, who in turn had purchased the property at a Chattell Mortgage sale.

The testimony shows that A. C. Roberts had been indebted to a private bank which in 1921 was organized into the State Bank of Pierson. The Roberts notes were not acceptable to the new bank, so that four individuals viz; Elmer Pierson, Roy Chambers, Elmer Sentel and Leslie Lewis, financed them for the new bank and took over the notes as their own property. The indebtedness of Roberts was then represented by a note payable to the State Bank of Pierson but really owned by the four parties above named. The note was renewed from time to time in the name of the new bank until March 18, 1930, at which time Roberts executed a note to the bank for the sum of $9299.49 and secured the same by Chattel Mortgage dated March 21, 1930, covering the property involved in this controversy. At that time Roberts and his wife were living together on a farm in Moultrie County. In September of that year the Defendant in Error entered into a contract with the four gentlemen owning the note to purchase the mortgaged property for the sum of $2000.00. She had received this amount of money from the proceeds of a matured insurance policy and had it invested in bonds which she sold to consummate this agreement. Together with her husband she consulted an attorney as to the proper method of acquiring title to the prop-

erty and he outlined and recommended the foreclosure of the Chattel Mortgage, purchase by some outside party and conveyance by Bill of Sale to Defendant in Error. The lawyer also recommended that the words "This note is secured by Chattel Mortgage" be endorsed on the note. This instrument with the Chattel Mortgage were held by Leslie Lewis for collection as the agent of the four parties owning the note. In the early part of November, 1930, Leslie Lewis placed the words "This note is secured by Chattel Mortgage" upon the note after being authorized by A. C. Roberts to do so, and after the words had been so added to the note A. C. Roberts approved of such action. The whole transaction was done with his knowledge, consent and received his approval. Leslie Lewis, as such agent, advertised the Chattel Mortgage sale by the posting of proper notices and held the same on December 10, 1930, on the farm occupied by Roberts and wife. Elmer Sentel purchased the mortgaged property at the sale, placed it in the hands of A. C. Roberts as custodian, and later accepted the $2000.00 from the Defendant in Error and gave her a bill of sale of the property. The bill of sale was dated February 12, 1931, acknowledged February 19, and recorded February 25th. The personal property continued to remain on the farm operated by Roberts and defendant in error.

It is contended by the Plaintiff in Error that the Chattel Mortgage was void because the note secured thereby did not state upon its face that it was secured by Chattel Mortgage as required by Cahill's Ill. St. 1921, Chap. 95, Par. 27, which has been held to apply in cases only where the note has been assigned. *Hogan* v. *Akin,* 181 Ill. 448. In this case both the assignment and the words "This note is secured by Chattel Mortgage" were placed on the note long before the Plaintiff in Error became a creditor of A. C. Roberts, and the same being done with the entire knowledge, consent and approval of A. C. Roberts, the Plaintiff in Error cannot complain.

It is further contended that because Elmer Sentel, the purchaser at the Chattel Mortgage sale, never took actual physical possession of the property, or posted any notice on the premises of the change in ownership that therefore he or his assigns are estopped now to claim title. The judgment of Plaintiff in Error was entered by confession in a foreign county more than one year after the mortgage sale. The agreement entered into between Defendant in Error and the owners of the note secured by Chattel Mortgage was for a good and valuable consideration and fairly carried out as between all the parties interested at the time of the sale. Defendant in Error was living with her husband on the farm and desired the use of the property at that

place and no other. There was no collusion or fraud shown to have been practiced on the rights of any third persons and the Court properly refused to hold the 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12th propositions of law submitted by Plaintiff in Error.

It is the opinion of this Court that the Defendant in Error established by undisputed evidence a good title to the property in controversy and that the judgment of the County Court of Moultrie County should be affirmed.

Affirmed.

(Three pages in original opinion.)

PUBLISHED IN ABSTRACT

Nellie L. Gregory, Appellee, v. City of Champaign, Appellant.

Appeal from Circuit Court of Champaign County.

JANUARY TERM, A. D. 1933.

Gen. No. 8731. **Agenda No. 12.**

MR. JUSTICE FULTON delivered the opinion of the court.

This was an action in case brought by Appellee against Appellant to recover damages for injuries sustained by Appellee in falling or tripping over a concrete block imbedded in a cinder walk on East Vine Street in the City of Champaign, Illinois. The declaration consisted of one count which charged negligence on the part of Appellant in permitting the obstruction to remain in the sidewalk after notice thereof.

The Appellee, Nellie F. Gregory, lived on Poplar Avenue, in Champaign, which street runs north and south. Virginia George lived at 303 E. Vine Street, which street runs east and west. Appellee's home was the first house south and west of the Virginia George residence.

On February 8, 1932, about seven o'clock in the evening Appellee left her home for the residence of Virginia George. After reaching Vine Street she proceeded east on the cinder walk and as she approached the house of Mrs. George she tripped or stumbled over something in the sidewalk and fell forward onto a concrete slab in the cinder walk which was an extension of the walk leading out from Mrs. George's home. Mrs. George and her brother were standing on the front porch and saw Appellee coming along the cinder walk and saw her stumble and fall. After helping her up, Mrs. George and her brother brought out a lantern to search for the pocket book of Appellee and discovered the concrete building block over which Appellee stumbled and fell. It was imbedded in the cinder walk two or three feet west of the extension of Mrs. George's concrete entrance walk. The Appellee, Mrs. George, her brother Mr. Willis Dewey Anderson, a son of Appellee, Mr. Baker, who lived in the neighborhood, and Charles Wilson, a milkman, all testified quite positively that the concrete block over which Mrs. George tripped extended up above the surface of the sidewalk from two and a half to four inches. Two or three of the witnesses testify that the block and sidewalk had

been in that same location and the same condition for more than six months, and Charles Wilson, the milkman, stated that about the middle of January before the accident he had seen it and stumbled over it himself. Several witnesses for Appellant testified that they lived in the neighborhood of 303 East Vine Street and had passed along the cinder sidewalk in question for weeks and months prior to February 8, 1932, and some of them as late as four o'clock in the afternoon of said day and that no stone or block as described by Appellee was imbedded in the cinder walk at the point described, at that time.

On a trial before the Court and a Jury, a verdict was returned in favor of the Appellee for the sum of $2000.00 upon which judgment was afterwards entered.

The Appellant contends that the obstruction in the sidewalk in this case was a latent one and that the Appellant had no notice of the same either actual or constructive. It is not insisted that there was any actual notice but we think under the evidence it was a question for the jury to determine as to whether or not a reasonable inspection would have disclosed the defect. Appellant relies largely on the case of *Boender* v. *City of Harvey*, 251 Ill., 228 in support of its contention, but in that case there was no notice of any kind upon the municipality, either actual or constructive and on account of lack of any notice the case was reversed. We believe the jury were warranted in finding that the facts and circumstances shown by the testimony amounted to constructive notice.

Appellant further contends that the verdict is manifestly against the weight of the evidence but a brief statement of the testimony as to whether or not the Appellant was guilty of any negligence shows that the question should be submitted to a jury. Our courts have repeatedly held that if there is any evidence, which standing alone, tends to prove the material averments of the declaration, the cause must be submitted to the jury. *Libby, McNeil and Libby v. Cook*, 222 Ill. 206.

Adopting the rule that a City is bound to use reasonable care in keeping its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety, there were sufficient facts proven in this case to support the finding by a jury of negligence on the part of Appellant.

It is further insisted that the verdict was excessive. The Appellee testified to a broken arm at the wrist, which the doctors said would result in a small permanent injury. She further testified to a sprained shoulder, a badly bruised and lacerated knee and an injury to her hip. She is not entirely corroborated by the doctors but the verdict is not sufficiently large to

warrant a Court in saying that the discretion to assess damages vested in a jury, was unreasonably exercised in this case. We do not find any serious objection to the instructions complained of, and finding no substantial error in the record the judgment of the Circuit Court will be affirmed.

Affirmed.

(Three pages in original opinion.)

PUBLISHED IN ABSTRACT 46

Vena Roberts, Appellee, v. W. A. Doss, Appellant.

Appeal from County Court of Moultrie County.

JANUARY TERM, A. D. 1933. 272 I.A. 634

Gen. No. 8739. **Agenda No. 18.**

MR. JUSTICE FULTON delivered the opinion of the court.

The findings of the Court on the facts and the conclusions of the Court on the questions of law involved in the suit of *Vena Roberts* as Defendant in Error *v. T. W. Doss*, Plaintiff in Error, Suit No. 8702 of this Court, arose out of the same set of facts as this case and are controlling in the questions arising on this Appeal. The judgment of the County Court of Moultrie County is therefore affirmed.

Affirmed.

(One page in original opinion.)

PUBLISHED IN ABSTRACT 47 A

Central Illinois Electric and Gas Company, Appellant, v. Central Utilities Corporation, Appellee.

Appeal from Circuit Court of Vermilion County.

APRIL TERM, A. D. 1933. 272 I.A. 635

Gen. No. 8750. **Agenda No. 8.**

MR. JUSTICE FULTON delivered the opinion of the court.

Appellant brought a suit in Assumpsit against Appellee in the Circuit Court of Vermilion County, the declaration consisting of three counts. The first count was to recover for certain electrical merchandise, but no reliance is placed upon this count and it is not involved in this appeal. The second and third counts were based upon the claim that the Appellant was engaged in the business of selling and delivering electric current as a public utility, and that certain rates and charges had been filed and approved by the Commerce Commission as provided by law, and that the Appellee had purchased current from Appellant at the prices fixed by the Commerce Commission, and that there was a balance due Appellant on the account of $2777.29. The declaration also contained the Common Counts. Appellee filed a plea of tender as to the second count of $465.00, and non-assumpsit as to the remainder of the amount claimed, and as to the other counts filed the general issue.

By agreement of parties a jury was waived and the case tried before the Court, and at the conclusion of the testimony, the Court denied Appellant's motion for a finding and judgment in its favor for the sum of $2777.29, and entered a judgment against Appellee for the sum of $465.00, being the amount tendered. A motion for new trial having been denied the Appellant prosecutes its appeal to this Court.

The controversy arises over the correct number of kilowatt hours of current delivered by the Appellant to the Appellee from March 24, 1930, to and including the month of July, 1931. In December, 1929, a transformer belonging to the Appellee burned out and for December of that year and the months of January and February following, the current was paid for at a flat rate. In March, 1930, Appellee put in another transformer to take the place of the one burned out. The name plate on this transformer indicated that it was constructed with what is known as a 10-5 ratio and the

meter reading was made on that ratio during the period in question. The Appellee was billed monthly for the electric current and paid on the basis of 10-5 ratio. Afterwards, the proof developed that the transformer was in fact a 15-5 ratio, which meant that 50% more current was furnished than indicated by the monthly bills. The proof of the formal allegations of the declaration was waived by stipulation of the parties, and in order to save technical proof it was further stipulated that in computing the amount of kilowatt hours on a 10-5 transformer, you multiply the index reading on the meter by 2, and if it is a transformer that has a 15-5 ratio, you multiply the index reading on the meter by 3. In this case the actual billed kilowatt hours was made on the ratio of 10-5 and after July 23, 1931, the end of the disputed period, it was made on the basis of a transformer ratio of 15-5. It was further stipulated that if the billing between March, 1930, and July, 1931, had been computed on a 15-5 ratio, the billing would be increased 50%.

The testimony shows that Appellant discovered a discrepancy between what it was paying the Illinois Power & Light Corporation for purchasing current wholesale, and the amount Appellee was paying the Appellant. In the investigation for the cause of such discrepancy, Appellant sought and did test the new transformer installed by Appellee, and found it to be a 15-5 ratio instead of a 10-5 ratio as shown on the name plate on the transformer. There were two transformers used and the testimony showed through a witness familiar with the catalog of the manufacturers that the other transformer according to its style number was also a 15-5 ratio, although it was not actually tested out by technical methods. Because of this proof, Appellant claims that it is entitled to the sum of $2312.29 in addition to the judgment rendered, that amount covering the difference between the electric current furnished and the amount billed and paid for.

Appellee offered no proof to refute the evidence above outlined, but introduced oral testimony showing that the business of the Company increased but little from 1926 to 1931, and that about February, 1930, they lost the business of a large coal company which reduced the amount of current consumed. Exhibit 2 attached to the sworn declaration discloses that after the installation of the new transformers the average consumption of electricity paid for by Appellee up to July, 1931, was 9800 kilowatt hours per month. Computing the same bills, based upon the alleged mistake, for the same period of time, would average 14,700 kilowatt hours per month. The average amount of kilowatt hours billed and paid for during the year 1929 was slightly less than 12,000.

Appellees offer for explanation of the difference and decrease in current between the average for 1929 and the average from March, 1930, to July, 1931, the loss of current formerly consumed by the coal company which ceased doing business in the early part of 1930. No effort was made by Appellee to substantiate or support such testimony by its books or records.

Appellee urges that there was no proof of any mistake in the account rendered: that the mistake was not shown to be mutual: that the action was brought long after an account had been monthly stated, the stated amount paid and accepted by the Appellant. It appears to this Court that there was clearly an error committed in the computation of the current during the period in dispute, and that the rendering of the bills, and the payment of the amount of same does not render an account stated so that Appellant was barred from instituting suit for the amount of the error. In *Union Electric Light & Power Co.* v. *Surgical Supply Co.* (Mo.) reported in 99 S. W. Rep. 804, bills were rendered monthly and paid for as in this case. There was a mistake in the description of the meter so that the bills were rendered for just one-half of what they should have been, and the mistake was not discovered until the expiration of the contract period. In a suit to recover the difference caused by the mistake that Court said "The fallibility of man is recognized, and a plaintiff is granted relief when it is made to appear that he has innocently and inadvertently made a mistake which has caused him injury and resulted in profit to the opposite party; nor does his right to relief in every case depend upon the knowledge or information or belief of the opposite party that the mistake has been made. It is enough if the mistake made resulted in injury to the plaintiff and to an unearned profit to the defendant, provided the latter, in ignorance of the mistake, has not so changed his situation with reference to the subject matter that to correct the mistake would result in injury to him." To the same effect is the case of *Nutterfield* v. *Dunn,* 221 App. 665. It is our judgment that the Appellant in this case sustained the allegations of its declaration by competent testimony and that the trial court erred in denying its motion at the close of all of the evidence for a finding and a judgment in its favor for the sum of $2777.29. The judgment below is therefore reversed with a finding of fact that the Appellant is entitled to recover from the Appellee the sum of $2777.29, and costs of suit.

Reversed with finding of fact.

The Clerk will enter judgment in favor of Appellant and against the Appellee for the sum of $2777.29 and costs of suit.

(Four pages in original opinion.)

PUBLISHED IN ABSTRACT

Clara Upton, Appellee, v. The Security Benefit Association, a Corporation, Appellant.

Appeal from Circuit Court of Sangamon County.

APRIL TERM, A. D. 1933.

Gen. No. 8756. **Agenda No. 14.**

MR. JUSTICE FULTON delivered the opinion of the court.

This was a suit in Assumpsit on a fraternal benefit certificate issued by The Security Benefit Association, the appellant, on the life of Adrian Upton. The beneficiary named in said certificate was the appellee, Clara Upton, who brought the action to recover the face value of the certificate of $1,000.00 on account of the death of Adrian Upton.

The declaration contained one count alleging the membership of Adrian Upton in Appellant Association: the issuance of a benefit certificate to him: a copy of the certificate: compliance with all the terms and conditions thereof: alleges the death of Adrian Upton, proof of death and the refusal of appellant to pay the amount of said certificate. Appellant filed no plea of general issue, thereby admitting the issuance of the certificate: the death of the assured: that notice and proof of death were filed with the defendant and that the defendant declined payment.

Appellant filed a special plea to the declaration alleging that during the time Adrian Upton was a member of appellant association, certain by-laws of the association, which were a part of the insurance contract, were in full force and were in substance as follows: Sec. 112 provides that all assessments shall be due on the first day of each calendar month and provides for automatic suspension of the member if such assessments are not paid on or before the last day of the month. Sec. 114 provides that reinstatement may be made by the member within sixty days of his suspension by payment of the assessment and dues then in arrears providing the member be then in good health and the payment of the assessment and dues by such member is made a warranty that he is in good health at the time of said payment. Sec. 115 provides that a member may be reinstated after a suspension of more than sixty days and less than six months by the member providing proof of sound bodily and mental health and getting the approval thereof of the Na-

tional Executive Committee and by paying all assessments and dues then due and provides that reinstatement shall take place only after the approval of the proof of good health and the payment of the assessment and dues. The special plea further alleges the failure of Adrian Upton to pay the assessment and dues due on the first day of June, 1929, at any time during said month of June: the automatic suspension of the member by reason of the non-payment of the June assessment and dues: an attempt by Adrian Upton to become reinstated by certain payments made on September 24, 1929, without making any proof of health at such time. The special plea also set forth the provisions of the by-laws providing that the association shall not be bound by the acceptance or retention of assessment and dues from members who are not entitled to reinstatement. The plea further alleges the tender back to appellee of the payment made for purpose of reinstatement and that the said Adrian Upton was not in good health at the time such attempt for reinstatement was made on September 24, 1929, nor at any time subsequent thereto until his death on November 4, 1929. Appellee filed a replication denying the allegations of the plea and again alleging complete performance with all the terms of the contract. On a trial the jury found the issues for the appellee and assessed the damages at $1,150.00. Judgment was entered on the verdict, from which judgment appellant appeals.

On October 18, 1926, Adrian Upton took out the benefit certificate in question and named his wife, Clara Upton, as beneficiary. At or about the same time a certificate was also issued to his wife, Clara Upton, in the sum of $1,000.00 and one to a son, Marion Upton, in the sum of $500.00. The payment on each of the parent certificates was $2.80 per month and on that of the son $1.40, making the aggregate monthly payment on all three certificates the sum of $7.00. The controversy arises over the payment of the June, 1929, assessment on the certificate of Adrian Upton, no question having been raised as to the failure to pay previous to that month. The proof on the question of the June payment is not entirely clear or satisfactory. Appellee testified that either she or her husband made the payments every month: that she retained some of the receipts for payments and that some were lost. She produced a receipt dated May 31, 1929 for $7.00, reciting that the payment was for April assessment for all three certificates. Another receipt produced by her was dated June 10, 1929, for $7.00, reciting payment for May, 1929, on all three certificates. Another dated October 29, 1929, for $3.05 covering assessments for June, 1929, for Adrian Upton. On the

same date, another receipt for $3.05 showed payment for October, 1929, for Adrian Upton. Another receipt, dated November 1, 1929, for the sum of $3.05, covered the November assessment for Adrian Upton. Appellee also testified that her brother-in-law, Carl Jones, paid three months assessments in July or August, 1929: that all these payments were made to a collector for the association called a Financier: that for some months prior to July, 1929, the financier to whom she made payments was Mrs. Ada Phillips: that subsequent to July, 1929, the payments were made to a financier named Hattie Fox: that in October, 1929, a deputy from the company came to appellee and informed her there was some controversy about the payment of the June assessment, and on his advice she made the payment of $3.05 at that time. On October 11, 1929, Adrian Upton was taken sick. On October 25, 1929, he was operated on for hernia and died on November 4th following.

Appellant contends that the proof shows a failure to pay the June assessment in 1929: that the insured therefore ipso facto forfeited all rights under the certificate: that no reinstatement of Adrian Upton was ever effected in compliance with the by-laws of the association and that the Court should have directed a verdict for the appellant. The burden of proof rested upon appellant to prove the material averments of its special plea.

While the testimony is far from satisfactory "it must at least be said that there is a conflict on the controlling question of whether or not the June assessment was paid. Appellant relies upon the testimony of appellee and the receipts produced by her to prove the defense set up in its plea. It is significant that they did not call the financier, Mrs. Phillips, who was making the collections prior to July, 1929, nor did they attempt to introduce in evidence any of the books or records of any kind, belonging to these officers to show the correct status of the payments, or the standing of Adrian Upton at the time of his death. On January 7, 1930, some two months after the death of Adrian Upton, appellee received a letter from the national secretary to the effect that her claim was rejected but stating among other things that "there was an uncertainty as to just how these payments were made with a view to reinstatement on this certificate, and some others" and tendering back the sum of $26.20 for premiums paid since June, 1929. In view of the testimony offered on the part of appellee hereinabove mentioned, we believe there was a sufficient conflict in the testimony concerning the payment of the June assessment, to warrant the Court in submitting that question of fact to the jury. "If there is in the record any evidence

from which, if it stood alone, the jury could, without acting unreasonably in the eyes of the law, find all the material averments of the declaration have been proven ,the case should go to the jury.'' *Libby, McNeill & Libby* v. *Cook,* 222 Ill., 206.

Believing as we do that the verdict of the jury on the question of fact should not be disturbed, it is not necessary to pass upon the other questions raised by appellant. The judgment of the Circuit Court is therefore affirmed.

Affirmed.

(Five pages in original opinion.)

PUBLISHED IN ABSTRACT 49

Georgia D. Nunes, Plaintiff in Error, v. National Fire Insurance Company of Hartford, a Corporation, Defendant in Error.

Error to Circuit Court of Morgan County.

APRIL TERM, A. D. 1933. 272 I.A. 635

Gen. No. 8759. **Agenda No. 17.**

MR. JUSTICE FULTON delivered the opinion of the court.

This was a suit upon a fire insurance policy issued by Defendant in Error, National Fire Insurance Company of Hartford, to Georgia D. Nunes, the Plaintiff in Error, upon a two story frame building to be occupied by tenants as a dwelling house, for $2000.00, and on a summer kitchen for $250.00, contents of summer kitchen $100.00, and on barn and sheds adjoining for $350.00. The policy was dated November 17, 1930, for a term of three years, and provided that if the premises should be occupied for other than farm purposes or if any of the buildings shall become vacant, and so remain for a period exceeding ten days, without the written consent of the defendant in error, then in either of said cases the policy shall become null and void. The premises were located about five and one half miles north and west of the city of Jacksonville. About five o'clock on the morning of January 15, 1931, the dwelling house, summer kitchen and contents were destroyed by fire, which was the basis of this suit.

The declaration alleged the execution of the policy, destruction by fire, insurable interest, proper notification, furnishing of proofs of loss, defendant's failure to pay loss, and fair cash market value of property destroyed. The defendant in error, besides the general issue, filed six special pleas, alleging that the premises were occupied for other than farm purposes; that the premises had remained vacant and unoccupied for a period of more than ten days without the consent of the defendant in error, that in making proof of loss the plaintiff in error falsely, under oath, stated that the building described in the policy was occupied at the time of the fire as a dwelling house and for no other purpose; that in making said proof of loss she falsely, under oath, stated there had been no change made in the use and occupation since the issuance of the policy: That the hazard had been increased and that at the

time of the loss the premises were used and occupied as a place for the manufacture and sale of intoxicating liquor in violation of the Prohibition Act, thereby increasing the hazard, and thereby rendering the policy null and void. Replications denying the material allegations of the pleas were filed. The plaintiff in error proved the material allegations of the declaration. The defendant in error introduced testimony in support of the special pleas which showed that plaintiff in error lived upon the farm in question until about the first of September, 1930, when she removed to the City of Jacksonville with her family. Her husband, Robert Nunes, remained on the premises until the 16th of November, 1930. On September 6, 1930, the sheriff of Morgan County raided the premises and discovered a complete still in operation in the summer kitchen of the dwelling house. The still and other equipment was destroyed by the sheriff and the husband arrested. He was later convicted, sentenced to the State Farm at Vandalia and left on November 16th to serve the said sentence. The policy in question was issued the next day. The husband, Robert Nunes, testified that as the agent of his wife, he leased the premises about the middle of October, 1930 to one Fortatus or Fortato, on a written lease for one year, at $300.00 per annum payable in advance; that Fortato took possession of the premises for the purpose of raising poultry, although none was ever placed on the farm up to the time of the fire. On December 22, 1930, the Sheriff and his deputies again visited the premises and found in the basement of the dwelling house a complete manufacturing plant for the distilling of alcoholic liquors. They discovered two large vats containing a large amount of mash, a large cooker, pipes, tanks and other paraphernalia used in the operation of a large still. In rebuttal plaintiff in error proved by her cousin Fernandez and the witness Cahill that they stayed in the dwelling house nights from December 27, 1930, until January 14, 1931, the night before the fire, and that no still was in operation during that period of time although they admit the vats were there and contained some liquid. At the close of the testimony, the trial court directed a verdict finding the issues for the defendant in error. Motion to set aside the verdict and for a new trial was denied and judgment was entered on the verdict. This writ of error is prosecuted from that judgment. Plaintiff in error contends that each and every material allegation of the declaration were fully proven and the trial court exceeded its power in taking the case from the jury. While it is true that where there is any evidence in the record from which, if it stood alone, the jury could, without acting unreasonably, "in the eyes

of the law" find that all of the material averments in the declaration had been proven, the case should go to the jury; still where an affirmative defense is offered and such evidence is not contradicted or explained, it is proper to direct a verdict for the defendant. *Schuerman* v. *Dwelling Houses Ins. Co.*, 161 Ill. 437. *Wallner* v. *Chicago Traction Co.*, 245 Ill., 148.

It is clear that there was ample proof introduced by defendant in error to prove the material allegations of one or more of the special pleas and the only question remaining is whether the plaintiff in error offered sufficient testimony in rebuttal to require the Court to submit the question of fact to the jury. There is no denial but that the Sheriff of Morgan County confiscated and destroyed all of the equipment used by Robert Nunes in operating a still in September 1930, and that the premises were subsequently leased for dwelling house purposes only. Neither is it denied or contradicted that on December 22, 1930, the Sheriff found a new, large, and elaborate equipment for manufacturing intoxicating liquor in the basement of the dwelling house, and that large quantities of mash in a state of fermentation were contained in the vats at that time. The only contradiction by the rebuttal proof is that no still was in operation during the last two weeks when Fernandez and Cahill were staying there nights. Neighbors testify that lights were burning in the house late on the evening before, after the departure of Fernandez and Cahill and also that the fire appeared to start from the basement. Harrison W. King, called as an expert, testified that a farm house insured as such and having an equipment of vats in which mash was cooked and a cooker in connection with pipes for the purpose of heating the mash, would change the classification of risk and increase the hazard. Expert testimony is admissible upon the question of whether the risk under an insurance policy was increased by a change in circumstances. *Traders Ins. Co.* v. *Catlin,* 163 Ill. 256.

It is our judgment that the testimony of the plaintiff in error did not contradict or explain the change in the use of the premises which resulted in an increase of the hazard and there was nothing in the proof which required the court to submit that question of fact to the jury. It was not error to instruct the jury to find the issues for the defendant in error, and the judgment of the Circuit Court is affirmed.

Affirmed.

(Four pages in original opinion.)

PUBLISHED IN ABSTRACT

50

Glenn Seymour, Administrator of the Estate of Walter M. Seymour, Deceased, Appellee, v. Chicago & Eastern Illinois Railway Company, a Corporation, Appellant.

Appeal from Circuit Court of Vermilion County.

OCTOBER TERM, A. D. 1933.

272 I.A. 635

Gen. No. 8680. **Agenda No. 37.**

Per Curiam:

Appellee as the Administrator of the Estate of Walter Seymour, deceased, obtained a judgment in the Circuit Court of Vermilion County against appellant for the sum of $5300.00 in an action on the case based on the negligence of appellant in the operation of a railroad train by which decedent was killed. The first count in the declaration charges that appellant was operating a railroad in a northerly and southerly direction through the City of Watseka, Iroquois County, across a street in said City known as Walnut Street which ran in an easterly and westerly direction; that the deceased was driving a live stock truck across the railroad at said crossing, and the defendant so negligently drove a train over the crossing that it struck Seymour and caused his death. In the second count it is charged that for five years or more appellant had maintained gates at said crossing and that at the time of the injury negligently failed to lower the same and that said injury was proximately caused by the failure of appellant to lower the gates.

The accident happened about 5:30 o'clock A. M. on December 3, 1931. The deceased was in the trucking business and he left Watseka about eight o'clock P. M. on the previous day with a load of live stock for the Union Stock Yards at Chicago and the accident happened as he reached Watseka on his return trip. He had made a number of these trips to Chicago previous to the accident and several times when he came to the Walnut Street crossing, either going or returning, the gates had been down and he had stopped until the trains had passed and the gates were raised. The evidence shows that appellant had operated these gates at this crossing both day and night for fifteen years. There is a sharp conflict in the evidence as to whether the gates were up or down when he attempted to pass over the tracks, the evidence for appellee tended to

show that the gates were lowered just after the accident while that of appellant tended to show that they were lowered before the accident. The gates were not injured in any way and showed no signs of a collision except it is claimed that some of the paint with which the truck was painted was scraped off on the tip ends of the gates. This might readily have been the result of the lowering of the gates after the accident took place, and, the fact that the gates were not broken or otherwise injured tends to corroborate the fact that they had not been down when the deceased attempted to cross the tracks. The evidence for appellant also tends to show that the bell on the engine was ringing, the headlight burning, the crossing signal sounded, a crossing bell ringing and a lantern with a red light was attached to the arm of one of the gates and the train was running about twenty miles per hour. The train was an express, mail and passenger train with a buffet and sleeping cars and did not on this day stop at the station in Watseka. There was but one eye witness to the accident, the fireman on the engine of the train. He testified in substance that the first thing he noticed of the accident was when he saw the front end of the truck come by the building and it did not look as if it was going to stop; that he saw the truck hit the gates and the gate on his side flew towards him and he slightly turned his head and yelled to the engineer and glanced back and watched the truck; that he saw the deceased run through the gate. It was for the jury to reconcile the evidence, and, as there was ample evidence to sustain its finding on the question of whether the gates were up or down when the decedent attempted to cross the track, we cannot disturb the same. The depot was located a short distance south of the crossing. In the case of *Sousie* v.*Payne,* 299 Ill. 552 where one of the grounds of negligence was that crossing gates were not operated, the Court said:

"It was also a question for the jury, on the evidence as to whether or not the deceased expected the gates to be operated against him if he was in danger."

It was held in the case of *C. & A. R. R. Co.* v. *Blaul,* 175 Ill. 183 that one who knows that a flagman is employed by a railroad company at a certain crossing may presume that he will be at his post and warn him of the approach of trains, and is justified to proceed in crossing the track in the absence of the watchman, although his view is partially obstructed. In the case of *C. & A. R. R. Co.* v. *Redmond,* 70 Ill. App. 119 it was held that a person who is familiar with the custom of a railroad company to close gates maintained at a railroad crossing when a train is about to pass, and with the location and surroundings, has a right to rely

upon the open gates as a notice to him that no train is close at hand, and as an invitation to him to make the crossing in safety, so far as an approaching train is concerned. This case was affirmed in 171 Ill. 347. This Court in *C. & A. Ry. Co.* v. *Wright,* 120 Ill. App. 218 held as follows:

"It is the well settled rule that when a railroad company assumes the duty to maintain gates or a flagman at a railroad crossing, that when the gates are open, or no signal of danger is given by the flagman, then the traveler can assume that it is safe to cross, and such traveler need only look and listen to be in the exercise of due care and caution for his own personal safety. *B. & O. R. Co.* v. *Stumpf,* 97 Md. 78 (54 Atl. 978): *Sights* v. *L. & N. R. Co.* (Ky.) 78 S. W. 172; *Woehrle* v. *Minnesota Transfer Ry. Co.* (Minn.), 84 N. W. 791., (52 L. R. A. 348); *Berry* v. *Penn. R. Co.*, 4Atl. Rep. 303."

Under the facts as disclosed by the evidence in this case it was for the jury to determine whether appellant was guilty of negligence and whether the deceased was guilty of contributory negligence and the Court did not err in refusing to instruct the jury to find its verdict in favor of appellant.

The first instruction given on behalf of appellee is criticized as to limiting the time of due care to just before and at the time of the collision when it should have extended the due care to the deceased as he approached the railroad crossing. It is only necessary to state that instruction 11 given on behalf of appellee announces the same principle, however, similar instructions have been approved, and were, in fact offered by and given for appellant. *Peterson* v. *Chicago Trac. Co.,* 231 Ill. 324; *Knox* v. *American Rolling Mill,* 236 Ill. 437; *Watts* v. *Wabash Ry. Co.,* 219 Ill. App. 549;*Fannon* v. *Morton,* 228 Ill. App. 415. The second instruction given on behalf of appellee is claimed to be erroneous on account of its grammer, the adverb "ordinarily" being used instead of the adjective "ordinary" in an instruction defining ordinary care. We do not believe that the jury were misled by the instruction given. The third instruction informs the jury that the question whether or not Seymour was exercising ordinary care for his own safety just before and at the time of the collision is one of fact to be determined by the jury from all the evidence and all the facts and circumstances in evidence in this case. While this instruction has been criticized in some cases the giving of it has never been held reversible error. The fourth instruction given on behalf of appellee is as follows:

"The court instructs the jury that if you believe from a preponderance of all the evidence in this case that the gates were not down when the defendant company's engine crossed Walnut Street, then the fact alone that Walter M. Seymour knew or might have, by looking or listening known of the presence of the defendant's engine and train at some point south of Walnut Street, would not preclude a recovery herein if you believe from a preponderance of the evidence that Walter M. Seymour by the exercise of ordinary care could not have known said train was going to cross Walnut Street, and exercised ordinary care in attempting to cross the railroad track."

It is claimed this instruction is erroneous in that it singles out the question of gates and ignores all the signals and warnings that would have served the same purpose as the gates and that it was error for the Court to suggest that the jury might guess or speculate as to what the deceased knew as to whether the train was going to stop at the depot or not. While we think that this instruction is inartificially drawn, yet appellee had a right to present his theory of the case to the jury which was that the gates were not lowered and thus became an invitation or notice to the deceased that the train would not cross the tracks until they were lowered, and we cannot say that a person in the exercise of ordinary care would not conclude from this fact that the train would stop at the depot before it crossed the street.

Error is also assigned that the Court erred in refusing to give the seventh and eighth instructions offered by appellant. The principles involved in the seventh refused instruction are covered by the eleventh instruction given for appellant and those involved in the eighth refused instruction are fully covered by the other instructions which were given.

Appellant asked the Court to submit to the jury two special interrogatories:

"1. Could Walter M. Seymour have seen the approaching train in time to have stopped his truck, had he looked with reasonable care?

2. Could Walter M. Seymour have heard the crossing bell and the engine bell, or either of them, in time to have stopped his truck, had he actually listened with reasonable care?"

The questions of fact submitted in these interrogatories are but evidentiary and not ultimate facts which would control the verdict under the evidence in this case. The jury might have answered in the affirmative as to both of these interrogatories or, in other words, might have found that the deceased could have seen the approaching train had he looked and also have

heard the crossing bell and the engine bell had he listened, yet such findings would not have been conclusive of his right of recovery under the facts in this case and it was not error for the Court to refuse them.

On the cross examination of the engineer, over the objection of appellant, the Court permitted counsel for plaintiff to prove that there was a rule of the railroad company not to run over fifteen miles through the City of Watseka because it was improper under the pleadings of the case. There was nothing in the pleadings of the case which made such a question improper and as the basis for the objection was without merit, the Court did not err in sustaining the objection thereto.

It is further claimed that this evidence was erroneous because the regulation of speed of railroad trains is under the jurisdiction of the Illinois Commerce Commission. This reason was not advanced as a cause for objection to the testimony mentioned, and when certain reasons are assigned for an objection to a question, other reasons are waived. At the instance of appellant the Court gave the following instruction which defined the law in regard to the speed of its trains:

"The court instructs you that the defendant, CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY, had the right to run its train at the time and place of this collision, at any rate of speed consistent with the safety of its train and passengers, and of persons rightfully upon its right-of-way at road crossings, who were exercising ordinary care in crossing the railroad. There is no law that prohibited the railroad operating its said train at any rate of speed consistent with such safety."

The speed of a railroad train consistent with the safety of persons rightfully upon its right-of-way at road crossings may, and frequently is, a question of fact for the jury to determine, particularly at crossings in cities and thickly populated communities. The rights of appellant in this regard were fully protected by the instruction given.

No error intervened on the trial of this case which in our opinion would justify this Court in reversing the judgment and the judgment of the Circuit Court is therefore affirmed.

Per Curiam:

This court rendered an opinion in this case January 16, 1933, and upon petition for rehearing by appellant, granted the same.

We have given further consideration to the arguments on the errors assigned for the reversal of the judgment and we are still of the opinion that under all

the facts and circumstances appearing from the evidence it was a question of fact for the jury to determine whether the deceased was in the exercise of due care prior to and at the time of the accident.

On the other points in the case our former opinion as modified expresses our conclusions thereon.

The judgment is affirmed.

(Eight pages in original opinion.)